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Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-567

WEST PENN POWER COMPANY,
a corporation,
Petitioner,

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petitioner, West Penn Power Company (hereinafter "West Penn"), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on July 30, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, appears in Appendix I hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 30, 1976. (Appendix I) A timely petition for rehearing *en banc* was denied on September 15, 1976. (Appendix J) On September 29, 1976, the United States Court of Appeals for the Third Circuit stayed the issuance of the certified judgment in lieu of formal mandate until October 22, 1976, and also determined that, "[n]o further stay will be granted, without prejudice to the right of [West Penn] to apply to the Supreme Court of the United States for a stay since the denial of the Petition for Rehearing has determined the Petition for Review." (Appendix K) On October 12, 1976, West Penn filed in this Honorable Court at Docket No. A 293 an Application to Mr. Justice Brennan for Stay of Enforcement Pending Disposition of Petition for Writ of Certiorari, which Application was denied on or about October 20, 1976. This Honorable Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit's dismissal of West Penn's Petition for Review and refusal to stay threatened enforcement by Respondent of the Pennsylvania implementation plan, constitutes a violation of the Fifth and Fourteenth Amendments of the United States Constitution, by effectively foreclosing West Penn's opportunity for a meaningful hearing upon the issues raised in the Petition for Review, which due process issue was not passed upon by this Honorable Court in *Union Electric Co. v. EPA*.

2. Whether the United States Court of Appeals for the Third Circuit's dismissal of West Penn's Petition for Review and refusal to stay threatened enforcement by Respondent of the Pennsylvania implementation plan is in conflict with express provisions of the federally-approved Pennsylvania implementation plan, the federal-state relationship created by the Clean Air Act Amendments of 1970, and the Tenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

A summary of the background of this case and related litigation will best illustrate the dilemma in which West Penn finds itself.

West Penn is a Pennsylvania corporation and public utility, having its principal place of business in Greensburg, Pennsylvania. West Penn provides electric utility service for approximately 470,000 customers in the southwestern and north central portions of the Commonwealth of Pennsylvania. Among West Penn's facilities is Boiler No. 33 of the Mitchell Power Station (hereinafter "Mitchell"), a coal-fired boiler providing steam for turbo-generator No. 3 at Mitchell. Mitchell is situated on 31 acres of land in Union Township, Washington County, Pennsylvania. As of June 30, 1976, West Penn had an undepreciated investment of $35,900,000. at Mitchell, including $1.5 million for an electro-static precipitator which was installed on Boiler No. 33 during 1971.

West Penn respectfully submits that the history of the case at bar, when considered in light of related litigation that originated before the United States District Court for the Western District of Pennsylvania and the Pennsylvania Environmental Hearing Board (hereinafter "Board"),[1] demonstrates that the relief

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1. Effective January 19, 1971, the Board undertook to exercise the powers and perform the duties previously delegated to, *inter alia,* the Pennsylvania Department of Health and the Pennsylvania Air Pollution Commission. See, the Pennsylvania Administrative Code of 1929, 71 P.S. §510-1(16), (23); Pennsylvania Administrative Agency Law of 1945, 71 P.S. §1710.1. The Board is the quasi-judicial arm of the DER with the authority, *inter alia,* to hold hearings and issue adjudications, "on any order, permit, license or decision of the [DER]." 71 P.S. §510-21.

requested herein is urgently needed to afford West Penn its constitutional right to obtain a meaningful hearing on the merits of its case.

The origins of this case and the related litigation summarized below can be traced to the Respondent's approval on May 31, 1972, of the Pennsylvania implementation plan for the attainment of national ambient air quality standards. West Penn believes it is important to note at the outset that the United States Court of Appeals for the Third Circuit has concluded that no opportunity has been provided for individual sources to obtain a meaningful hearing regarding either the adoption of the sulfur oxide standard by the DER or the Respondent's approval of the Pennsylvania implementation plan.[2] Included in the approved implementation plan was a regulation[3] of the DER pertaining to the control of sulfur oxide emissions from power plants, including Mitchell.

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2. See *Duquesne Light Co. v. EPA I,* 481 F.2d 1, 8-9 (3d Cir. 1973), for a discussion of the Third Circuit's determination that companies similarly situated have not had an opportunity to obtain a meaningful hearing in connection with the DER's adoption of the sulfur oxide regulation.

3. Mitchell is located in Union Township, Pennsylvania. The sulfur oxide standard applicable to the Monongahela Valley Air Basin encompassing Union Township appears in 25 Pa. Code §123.22, which provides in part that:

> "[n]o person shall cause, suffer, or permit the emission into the outdoor atmosphere of sulfur oxides, expressed as SO_2, from any combustion unit, at any time, in excess of . . . 0.6 pounds per million B.t.u. of heat input when the heat input to the combustion unit in millions of B.t.u.'s per hour is equal to or greater than 2,000."

Because the sulfur oxide regulation was immediately applicable, the Pennsylvania implementation plan provided for variances from that standard. Significantly, the implementation plan also provided that the filing of a Petition for Variance operates as an automatic stay of prosecution for any alleged violation of the sulfur oxide emission limitation until final disposition of the application for variance.[4]

On September 15, 1972, pursuant to the Pennsylvania Air Pollution Control Act, 35 P.S. §4013.5, West Penn applied to the DER for a variance, as amended (Appendix A), for Boiler No. 33 at Mitchell from, *inter alia,* the sulfur oxide emission limitation contained in the Pennsylvania implementation plan.

On September 13, 1973, despite the pendency of the aforementioned Amended Petition for Variance which operated as an automatic stay of prosecution, the Respondent issued to West Penn a Notice of Violation of the Pennsylvania implementation plan, allegedly pursuant to Section 113(a)(1) of the Clean Air Act Amendments of 1970 (hereinafter "Clean Air Act"), 42 U.S.C. §1857c-8(a)(1). On February 18, 1975, the Respondent issued to West Penn a compliance order allegedly pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. §1857c-8(a)(1).

Six days after Respondent's issuance of the Notice of Violation, the DER granted to West Penn a conditional variance (see Exhibit to Appendix B) from the

4. See, 25 Pa. Code §141.5, reproduced in Appendix M at p. 133a. See also the Pennsylvania Bulletin of April 28, 1973, at page 808 extending the automatic stay of prosecution until final action by the DER on the pertinent variance application, which Notice is reproduced in Appendix M at p. 134a.

sulfur oxide emission standard of the Pennsylvania implementation plan until June 30, 1976. The conditional variance, however, ordered West Penn to install a sulfur emission control device on Boiler No. 33. Because West Penn believed and still believes that national ambient air quality standards can be attained and maintained without the installation of a sulfur control device at Boiler No. 33, and further believes that such a device is environmentally unsound and economically infeasible for installation on Boiler No. 33,[5] West Penn

5. The conditional variance issued by the DER would require the installation of a non-regenerative sulfur emission control device at Mitchell. Among the obstacles that would confront West Penn if it were to attempt to install such a sulfur emission control device are the following: (1) West Penn's inability to finance the installation of a sulfur emission control device now estimated to cost in the range of $50-90 million; (2) creation of 3.6 million tons of waste product over 25 years which cannot be disposed of in a safe or environmentally sound manner, or without violating the "no-dumping" ordinances of the township where Mitchell is located; (3) severe space limitations at the Mitchell site which could prevent installation of such a device, or at the very least, significantly increase the costs to West Penn and West Penn's customers; (4) creation of fumes by such a device which may be deleterious to the immediate area surrounding Mitchell; (5) numerous unsolved engineering problems. Even if, *arguendo,* an economically and technologically feasible sulfur emission control device could be installed, disposal of by-product wastes would create difficult, if not insuperable problems, resulting in a conflict with other environmental requirements of the Commonwealth of Pennsylvania, e.g., Pennsylvania Solid Waste Management Act, 35 P.S. §6001 *et seq.* West Penn could be required to obtain, *inter alia,* the following authorizations and commitments before it could begin installation of such a device—(a) state installation permit; (b) state indus-

appealed to the Board[6] certain of the conditions of the variance as well as the invalidity of the underlying regulations.

Thus, beginning in September, 1973, Respondent totally disregarded the stay of prosecution to which West Penn was entitled by the filing of its Amended Petition for Variance and subsequent appeal. Since then, West Penn has been faced with the threat of federal enforcement while at the same time attempting to obtain a variance, the terms of which would become part of the federally-approved Pennsylvania implementation plan.

a. District Court Action

On December 20, 1973, in the belief that the Respondent was without authority to issue the September, 1973 Notice of Violation, West Penn sought to insure the integrity and efficacy of the hearing to be held before the Board, or in the alternative, to obtain a hearing on its claim in a federal forum (either before the District Court or the Respondent), by filing a Complaint, as subsequently amended, in the United States District Court for the Western District of Pennsylvania (Appendix C) against the Respondent, the DER and the Secretary of the DER. The Amended Complaint

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trial waste permit; (c) federal water pollution control permit; (d) state solid waste management permit; (e) state sedimentation and erosion control permit; (f) state dams and encroachment permit; (g) state certificate of public necessity and convenience, if condemnation is necessary. These matters have been timely raised by West Penn before the Court of Appeals in the instant case and the Board.

6. West Penn's appeal was taken pursuant to the Pennsylvania Administrative Code of 1929, 71 P.S. §510-21. See, footnote 1, *supra* at p. 4.

sought injunctive relief to prevent the Respondent from enforcing the Notice of Violation issued in September, 1973, or, in the alternative, an order directing Respondent to hold an adjudicatory hearing on West Penn's claims.

On June 19, 1974, the District Court dismissed West Penn's Amended Complaint (Appendix E) for lack of subject matter jurisdiction in reliance on *Getty Oil Co. v. Ruckleshaus,* 467 F.2d 349 (3d Cir. 1972), *cert denied* 409 U.S. 1125 (1973). The Court stated that the issues raised by West Penn could have been raised in a Petition for Review filed with the United States Court of Appeals for the Third Circuit pursuant to Section 307 (b) (2) of the Clean Air Act, 42 U.S.C. §1857h-5(b) (2). The District Court subsequently denied West Penn's request for reconsideration (Appendix F).

On appeal to the United States Court of Appeals for the Third Circuit, West Penn limited its contentions to the District Court's refusal to enjoin enforcement of the Notice of Violation in light of the stay of enforcement to which West Penn was entitled under the Pennsylvania implementation plan. The dismissal of the Amended Complaint was affirmed at Docket No. 74-2050 by a divided three-judge panel of the Court of Appeals (Appendix G, including majority and dissenting Opinions). The majority held that, although the issues raised by West Penn had been improperly characterized by the District Court as falling within Section 307(b), nevertheless, jurisdiction did not lie in the District Court to determine whether the Respondent had properly issued the Notice of Violation because the Notice of Violation did not constitute "final agency action." On August 15, 1975, although three members

of the Court of Appeals voted to grant a rehearing, West Penn's Request for Rehearing *En Banc* was denied by a majority of the Court of Appeals (Appendix H).

On June 21, 1976, this Honorable Court denied West Penn's Petition for Writ of Certiorari filed at Docket No. 75-974 and, on October 4, 1976, also denied West Penn's Petition for Rehearing.

b. Petition For Review

On March 20, 1975, West Penn filed a Petition for Review (Appendix D) in the United States Court of Appeals for the Third Circuit at Docket No. 75-1259 in reliance upon the Third Circuit's decision in *Getty Oil Co. v. Ruckleshaus,* 467 F.2d 349 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973), which indicated that West Penn's contentions could be raised in the Court of Appeals in a Petition for Review, pursuant to Section 307(b)(2) of the Clean Air Act, 42 U.S.C. §1857h-5(b)(2).

On May 19, 1975, the United States Court of Appeals for the Third Circuit entered an Order staying enforcement of Respondent's previously issued compliance order until 30 days after disposition of West Penn's Petition for Review.[7]

On October 3, 1975, the United States Court of Appeals for the Third Circuit stayed disposition of West Penn's Petition for Review pending settlement negotiations between West Penn, Respondent and the DER. As a result of lengthy good faith negotiations, West

7. The September 29, 1976, Order of the Court of Appeals (Appendix K) states that the denial of West Penn's Petition for Rehearing *En Banc* on September 15, 1976, determined the Petition for Review.

Penn did reach a tentative agreement with the DER. Respondent rejected that agreement.

On June 25, 1976, this Honorable Court decided the case of *Union Electric Co. v. EPA,* 44 U.S.L.W. 5060 (U.S. June 25, 1976), holding that claims of economic and technological infeasibility cannot ordinarily be raised via a Petition for Review filed pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. §1857h-5(b). Instead, it was determined that such claims are to be raised before state administrative and judicial bodies, particularly those state agencies charged with granting variances from applicable air emission standards, which variances may then be designated as revisions to the pertinent state implementation plan.

As previously noted, on July 30, 1976, the United States Court of Appeals for the Third Circuit dismissed West Penn's Petition for Review (Appendix I), based upon *Union Electric Co. v. EPA, supra,* and despite its decision in *Duquesne Light Co. v. EPA,* 481 F.2d 1 (3d Cir. 1973). See discussion, *infra,* at p. 17. Prior to the dismissal of West Penn's Petition for Review, West Penn argued that if it were not granted a hearing it would be denied due process of law as a result of the District Court's dismissal of West Penn's Amended Complaint and West Penn's inability to obtain a meaningful hearing before the Board.[8] In response to this argument, the Court of Appeals recognized in its July 30, 1976, dismissal of the Petition for Review (Appendix I at p. 4)

8. On July 14, 1976, West Penn filed with the Third Circuit in the instant case a Motion for Oral Argument and Additional Comments on *Union Electric Co. v. EPA.* In that Motion, West Penn pointed out that in *Union Electric,* petitioner had failed to present its claims of denial of due process to the Eighth Circuit Court of

that West Penn could not obtain a meaningful hearing before the Board in view of the outstanding Notice of Violation and compliance order, but reasoned that West Penn could obtain a hearing or a stay of enforcement in the District Court by seeking review of the compliance order issued by the Respondent in February, 1975. However, on August 27, 1976, the Respondent issued an Order withdrawing the compliance order, thereby effectively depriving West Penn of prompt access to the District Court on its claims of economic and technological infeasibility.[9]

On August 13, 1976, the decision in *Union Electric Co. v. EPA, supra,* having validated West Penn's conclusion that the most appropriate forum for obtaining relief on its claims was before the Board, West Penn filed a Petition for Rehearing *En Banc* with the Court of Appeals for the Third Circuit. West Penn requested that the Court issue a stay of federal enforcement so

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Appeals; there had been no showing in *Union Electric* that the Petition for Review was petitioner's sole opportunity to raise its claims of technological and economic infeasibility; and, this Honorable Court in *Union Electric* did not grant certiorari on the due process issue. West Penn specifically indicated that, in contrast to the background of the Union Electric case, the instant case did involve a clear deprivation of West Penn's right to a meaningful hearing which, because of Respondent's improper enforcement action, was no longer available before the Board. Furthermore, this issue was timely raised before the Court of Appeals.

9. West Penn would respectfully direct this Honorable Court's attention to the recent case of *Friends of the Earth v. Potomac Electric Power Co.,* ..... F. Supp. ....., 9 E.R.C. 1122 (D.D.C. 1976), wherein it was determined that the Clean Air Act does not permit claims of economic and technological infeasibility to be raised as a defense to an action brought to enforce an implementation plan.

that a meaningful state hearing could be obtained, unencumbered by EPA enforcement which would be inconsistent with any Order subsequently issued by the Board.

On September 15, 1976, the Court of Appeals for the Third Circuit denied West Penn's Petition for Rehearing and Stay of Enforcement (Appendix J).

By Order dated September 29, 1976, the Court of Appeals for the Third Circuit stayed issuance of its certified judgment until October 22, 1976, but refused to grant West Penn's request for a stay of enforcement pending review by this Honorable Court (Appendix K).

Since the dismissal by the Court of Appeals of West Penn's Petition for Review, a number of events have occurred which have confirmed West Penn's earlier representations to the United States Court of Appeals for the Third Circuit that the threat of enforcement by the Respondent has operated to deny West Penn due process of law:

> (1) As previously noted, on August 30, 1976, Respondent withdrew the compliance order. The Respondent, however, left in full force and effect its Notice of Violation issued on September 13, 1973, thereby preventing West Penn from obtaining the review in the District Court envisioned by the Court of Appeals and leaving West Penn and its officers in jeopardy of immediate enforcement action;[10]

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10. By withdrawing an 18 month old compliance order for "staleness," but leaving a 37 month old Notice of Violation in "full force and effect," Respondent has effectively placed West Penn and its officers *in terrorem* on a continuing basis without an opportunity for West Penn to present its claims of economic and technological infeasibility to an administrative or judicial body ca-

(2) Respondent has again refused to voluntarily refrain from taking enforcement action pending the outcome of state variance proceedings scheduled to begin before the Board on November 3, 1976;

(3) On August 25, 1976, three years after the filing of West Penn's appeal as of right to the Board from the issuance of the conditional variance and two months before the scheduled hearing before the Board, the DER moved to dismiss West Penn's appeal (Appendix L). The DER has alleged, *inter* alia, that West Penn's claims cannot be raised before the Board and that, if West Penn's claims had any merit, West Penn would have succeeded upon the Petition for Review.[11] In addition, on October 1, 1976, the DER moved to continue indefinitely the November 3, 1976 hearing.

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pable of granting the requisite relief. Moreover, West Penn has thereby been denied an opportunity to present evidence to Respondent on the issue of economic and technological infeasibility as was envisioned by this Honorable Court's decision in *Union Electric v. EPA*.

11. In stating on one hand, that West Penn must present its claims in a Section 307(b) Petition for Review, and on the other hand claiming that the dismissal of West Penn's Petition for Review constituted federal judicial approval of the Pennsylvania implementation plan, the DER has completely discounted or ignored this Court's decision in *Union Electric v. EPA, supra*. The DER also fails to grasp the fact that West Penn has never been able to obtain a hearing on the merits before the Court of Appeals or in any other forum. For these and other reasons, West Penn is vigorously opposing the Motion to Dismiss.

REASONS FOR GRANTING THE WRIT

1. Review Of The Decision Below Is Urgently Needed In Order That West Penn Not Be Deprived Of Its Fundamental Constitutional Right To A Meaningful Hearing Upon The Issues Raised In The Petition For Review, Which Due Process Issue Was Not Resolved By This Honorable Court's Decision In *Union Electric Co. v. EPA*.

This Honorable Court in *Union Electric Co. v. EPA*, 44 U.S.L.W. 5060 (U.S. June 25, 1976), determined that a Court of Appeals reviewing an approved state implementation plan in the context of a Section 307(b) Petition for Review cannot set that plan aside on the basis that compliance with such plan is economically or technologically infeasible. This holding was premised upon this Honorable Court's determination that the primary forum for raising claims of economic and technological infeasibility is before the state administrative agency charged with granting variances from the provisions of state implementation plans. In *Union Electric, supra*, this Honorable Court referred to the Pennsylvania Administrative Agency Law of 1945, 71 P.S. §1710.41 (1962),[12] as an example of a provision for judicial resolution of such questions by state courts.

In pursuing its application for variance, West Penn was acting in accordance with revision procedures specifically referred to by this Honorable Court in *Union Electric Co. v. EPA, supra*. Thus, in October, 1973, West

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12. 71 P.S. §1710.41 (1962), has been suspended in part and repealed in part by the Pennsylvania Rules of Appellate Procedure, Rule 5105(c), (d), effective July 1, 1976, and by the Pennsylvania Appellate Court Jurisdiction Act of 1970, July 31, P.L. 673, No. 223, 17 P.S. §211.508(a)(71).

Penn filed a Notice of Appeal to the Board challenging the terms of the conditional variance granted by the DER in September, 1973, and also challenging the necessity for and the validity of the DER's sulfur oxide regulation as applied to Mitchell. The Respondent interjected himself into the state variance proceeding by issuing a Notice of Violation and compliance order in clear contravention of the Pennsylvania implementation plan's provision that the filing of the Amended Petition for Variance constituted a stay of prosecution pending the outcome of the appeal.

From that point forward, such interference by Respondent is believed by West Penn to have caused a delay of more than three years in scheduling a hearing upon West Penn's appeal before the Board. In addition, the Notice of Violation (currently outstanding) and subsequent Compliance Order (recently withdrawn), have raised and continue to raise the spectre of federal enforcement inconsistent with any order issued by the Board as a result of hearings finally scheduled for November 3, 1976, thereby threatening to foreclose any resolution by the Board of the issues raised by West Penn.

Any argument that West Penn's apprehensions in this regard are "speculative" ignores the undisputed fact that, for reasons known only to the Board, after Respondent's issuance of the Notice of Violation, three years elapsed before a hearing was scheduled. Neither is it unreasonable to conclude that the Respondent will resume its enforcement, given Respondent's refusal to join West Penn and DER in a settlement of the state appeal, Respondent's consistent unwillingness to voluntarily stay enforcement pending the outcome of Board proceedings, and the recent withdrawal of the February, 1975 compliance order, which withdrawal order expressly provides that the Notice of Violation "remains in full force and effect."

West Penn respectfully submits that it is entitled to relief from the Respondent's improper issuance of the Notice of Violation since the risk of penalties under the Clean Air Act are *per se so* coercive as to constitute a denial of due process. *Floersheim v. Engman,* 494 F.2d 949 (D.C. Cir. 1973); *Duquesne Light Co. v. EPA I,* 481 F.2d 1 (3d Cir. 1973).[13] At the very least, such relief should take the form of a stay of enforcement pending a conclusive resolution of West Penn's appeal by the Board or the Courts of the Commonwealth of Pennsylvania. However, since the Respondent has indicated by his actions that he is unwilling to permit Pennsylvania process to govern this case, it is doubtful that state hearings, if held, will conclude the issues raised by West Penn, including the need for a revision to the Pennsylvania implementation plan as it relates to sulfur oxide emission standards at Mitchell. For this reason, a hear-

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13. The United States Court of Appeals for the Third Circuit wrote in pertinent part as follows:

> "The basic problem presented by the *Getty Oil* dilemma and the legislative hearing request is that the petitioning companies are liable to sanctions before they have had an opportunity either to complete their state administrative and judicial remedies or to be heard at the federal level. The Court finds that to expose the companies to the risk of punishment without affording them full occasion to express their objections to the state implementation plan is fundamentally unfair."

481 F.2d at p. 10.

We also note that in response to Respondent's withdrawn February, 1975 compliance order, West Penn has filed an application with the Pennsylvania Public Utility Commission to close Mitchell.

ing in a federal forum upon West Penn's Petition for Review may be the only effective means of satisfying due process without doing violence to the guiding principles announced in *Union Electric Co. v. EPA, supra,* and *Train v. NRDC, Inc.,* 421 U.S. 60 (1975).

The decision of the Court of Appeals denying the Petition for Review and refusing to issue a stay of enforcement has caused a continuing threat of inconsistent dual enforcement by the EPA and DER, thereby eliminating the possibility of West Penn's obtaining a meaningful hearing on its claims of economic and technological infeasibility in either state or federal forums. Refusal by the Court of Appeals to grant West Penn's request for stay of enforcement is particularly harsh in view of this Honorable Court's observation in *Union Electric* that:

> "A variance approved as a revision of a plan under §110(a)(3)(A) will be honored by the EPA as part of an applicable implementation plan, §110(d) . . . "

44 U.S.L.W. 5066 at footnote 15.

This principle was the keystone of this Honorable Court's decision in *Union Electric*. It is obvious from the previously cited circumstances that, unless restrained by this Honorable Court, the Respondent intends to continue to threaten federal enforcement throughout the pendency of proceedings before the Board. It is also apparent that the Respondent will continue to arbitrarily disapprove as a revision to the Pennsylvania implementation plan, any variance which does not conform to his preconceived requirements. This is notwithstanding the fact that the Respondent has published a notice in the Federal Register that there were no violations of ambient air quality standards during 1975 in the air basin in which Mitchell is located,[14] and also despite the fact that West Penn has repeatedly presented to the Respondent competent scientific evidence demonstrating that the requested variance will not interfere with the attainment or maintenance of ambient air quality standards.

West Penn respectfully submits that the decision of this Honorable Court in *Union Electric Co. v. EPA, supra,* clearly did not address the due process issue which is central to the case at bar. In this regard, this Court stated in *Union Electric* as follows:

> "Petitioner has briefed its contention that the Due Process Clause of the Fifth Amendment demands that at some time it be afforded the opportunity to raise before a court claims of economic and technological impossibility. This claim was neither presented to, nor considered by, the Court Appeals, and we declined to grant certiorari on the question. 423 U.S. 821 (1975). In any case, we could not resolve petitioner's claim here, for there has been no showing that a § 307(b)(1) appeal would be the only opportunity for petitioner to raise before a court its claims of economic and technological impossibility."

44 U.S.L.W. at 5066, fn. 19.

Unlike the circumstances in *Union Electric Co.,* in the instant case West Penn has presented in detail its claims of denial of due process to the Court of Appeals below. Moreover, the history of this case as

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14. See Federal Register of July 13, 1976, at page 28828, reproduced in Appendix M at p. 129a.

it has been described, *supra,* demonstrates that invalid enforcement actions by the Respondent have not only caused an unjustifiably long delay in the scheduling of a hearing before the Board but, moreover, continuing enforcement and the threat thereof has insured that any hearings which may be held before the Board will be a hollow exercise which can only result in conflicting state and federal enforcement.

West Penn is clearly entitled to an opportunity for a meaningful hearing appropriate to the nature of this case. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Armstrong v. Manzo,* 380 U.S. 545 (1965). Pursuant to this Honorable Court's decision in *Union Electric Co. v. EPA,* revisions to state implementation plans are ordinarily to be accomplished by the Board. However, if the Respondent is permitted to continue to disregard provisions of the Pennsylvania implementation plan, there will be real doubt as to whether the Board will be able to freely exercise this function. Even if a state hearing is held before the Board, it will be meaningless since the Respondent may demand West Penn's obedience to a federal compliance order. Therefore, it is entirely appropriate and not inconsistent with the principles announced in *Union Electric,* that West Penn be permitted under the circumstances to litigate its claims in the Court of Appeals in the context of the Petition for Review. This is especially proper since the District Court may no longer be an available forum to consider West Penn's claims of economic and technological infeasibility as a result of the Respondent's withdrawal of the February, 1975 compliance order.[15]

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15. The Court of Appeals below indicated that West Penn could raise its claims in a District Court action challenging Respondent's issuance of the February, 1975 compliance order. This view appears to have been rejected in the case of *Friends of the Earth v. Potomac Electric Power Co.,* ..... F. Supp. ....., 9 E.R.C. 1122 (D.D.C. 1976)—further evidence of the confusion as to how due process shall be satisfied under the instant circumstances in the wake of *Union Electric Co. v. EPA, supra.*

In summary, West Penn believes that this Honorable Court, in its recent decision in *Union Electric Co. v. EPA, supra,* did not, given the circumstances attendant upon this case, preclude consideration of claims of technological or economic infeasibility of compliance with a state implementation plan in the context of a Section 307(b) Petition for Review, since a meaningful hearing is obviously unavailable from state authorities as a result of invalid enforcement measures by the Respondent. In the circumstances, West Penn believes that due process can only be satisfied by an Order of this Court:

> (1) permitting West Penn to present its claims to the United States Court of Appeals for the Third Circuit[16] and staying any further enforcement by the Respondent pending a disposition of the Petition for Review; or,
>
> (2) if state variance proceedings now scheduled to begin on November 3, 1976 are finally held, staying any further enforcement by the Respondent in deference to a final resolution of West Penn's claims by the Board.

16. West Penn believes that if the Court of Appeals adopts West Penn's position and invalidates the federally-approved sulfur oxide regulation, the Respondent would, on that basis, be required to approve a revision to the Pennsylvania implementation plan reflecting that determination.

2. Review Of The Decision Below Is Necessary In Order That This Honorable Court Clarify Confusion Regarding Federal-State Administration And Enforcement Of The Clean Air Act.

The questions presented by this case involve important issues in a developing area of the law involving the unique federal-state relationship created by the Clean Air Act.

In the case of *Train v. NRDC, Inc.*, 421 U.S. 60 (1975), this Court addressed the question of whether state environmental regulations providing for variances from emission limitations were valid because they constituted postponements of a state implementation plan which the Respondent had approved. This case presents an important corollary, i.e., whether the Respondent may ignore valid variance provisions of a state implementation plan by taking enforcement action which conflicts with provisions of the implementation plan and thereby prevent persons subject to the plan's emission limitations from obtaining relief specifically prescribed by the approved plan. West Penn believes that unless this Court determines that a variance, valid under the test espoused by this Court in *Train v. NRDC, Inc., supra,* is a defense to an enforcement action by the Respondent, then the Respondent will not be constrained from indiscriminately issuing notices of violation, even to those who are in compliance with a state implementation plan, with or without the benefit of a variance.

West Penn finds itself in a dilemma. However, West Penn's dilemma, as noted by the Court of Appeals in its Opinion at Docket No. 74-2050, is unlike the dilemma presented in *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), *cert denied* 409 U.S. 1125 (1973),

quoted approvingly by this Court in *Train v. NRDC, Inc., supra,* because it is not a result of West Penn's attempt to circumvent a state implementation plan. To the contrary, West Penn has in all respects attempted to comply with the Pennsylvania implementation plan. If the Respondent's action in this matter is permitted to go unchecked, it will have the effect of undermining state implementation plans and frustrating Congress' intent to give the states primary authority in the field of air pollution control. *Train v. NRDC, Inc., supra.*

As noted, the Respondent has at every possible opportunity sought to block West Penn's efforts to resolve this matter in state forums as provided by the Clean Air Act, the Pennsylvania implementation plan and this Honorable Court's decision in *Union Electric.* First, Respondent issued a Notice of Violation and subsequently a compliance order in contravention of the Pennsylvania implementation plan. Second, Respondent refused to approve a tentative agreement between West Penn and the DER which would have resolved West Penn's variance appeal. Third, Respondent, having blocked a negotiated settlement, then refused to voluntarily withhold its enforcement power during the pendency of imminent variance hearings, which stay of enforcement is expressly provided for in the Pennsylvania implementation plan as approved by the Respondent.

In the recent case of *Fry v. United States,* 421 U.S. 542 (1975), this Honorable Court stated that:

> ". . . Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

421 U.S. at 547, footnote 7.

It follows that neither can an administrative body to which Congress has delegated functions exercise its authority in contravention of this principle. *District of Columbia v. Train,* 521 F.2d 971, 992-94 (D.C. Cir. 1975), *cert. granted* 44 U.S.L.W. 3685 (U.S. June 1, 1976).

This Honorable Court's holding in *Train v. NRDC, Inc.,* 421 U.S. 60 (1975), established a companion principle when it noted that Congress, in passing the Clean Air Act, had explicitly preserved the principle that,

> "[e]ach state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . ."

421 U.S. at 64. See also, 42 U.S.C. §1857c-2(a).

The Court further concluded that the discretion left to the states included the continuing authority to revise choices about the mix of emission limitations which may be utilized to achieve and maintain national ambient air quality standards. Any other interpretation of the states' authority would have completely changed the character of a state's role from a voluntary participant as a co-sovereign to that of merely an impotent appendage to the United States Environmental Protection Agency. While this Honorable Court avoided such a result in interpreting the Clean Air Act in *Union Electric Co. v. EPA,* in the instant case the Respondent has acted in a manner designed to frustrate Pennsylvania's role as a sovereign entity.

The makers of our Constitution chose to rely on a *federal* system of government, and on a *balance* of power, to guarantee both efficiency and liberty. The Pennsylvania legislature has delegated to the Board its authority to determine the mix of emission limitations

which are appropriate for Pennsylvania. If the Respondent is not restrained from exercising or threatening to exercise enforcement powers which serve to emasculate variance proceedings scheduled before the Board, Respondent will have succeeded in arrogating unconstitutionally broad powers which will undercut the intended role of the Commonwealth of Pennsylvania in implementing the Clean Air Act.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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DATED: OCTOBER 22, 1976

Supreme Court, U. S.
FILED
OCT 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-5671

WEST PENN POWER COMPANY,
a corporation,
Petitioner,

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX

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APPENDIX "A"

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

BUREAU OF AIR QUALITY AND NOISE CONTROL
DIVISION OF ABATEMENT AND COMPLIANCE
Room 907 Health and Welfare Building
Harrisburg, Pennsylvania 17105

Amended Petition for Variance

Title 25, Part I, Subpart C, Article III, Chapter 141

1. *Name, Address, and Telephone Number of Petitioner*

   West Penn Power Company
   800 Cabin Hill Drive
   Greensburg, Pennsylvania 15601
   Telephone: 412-837-3000

2. *Name, Address, and Telephone Number of Person Authorized to Receive Notices*

   Mr. Ralph J. Gunkle, Jr.—Secretary-Treasurer
   West Penn Power Company
   800 Cabin Hill Drive
   Greensburg, Pennsylvania 15601
   Telephone: 412-837-3000

3. *Name and Location of Facility for Which Variance Is Sought*

   Mitchell Power Station
   Courtney, Union Township
   Washington County, Pennsylvania
   (Monongahela Valley air basin)

4. *Type and Description of Facility*

   Coal-fired steam electric generating station consisting of four boilers and related generating units rated as follows:

	December Normal Seasonal Operating Capacity		
(1) Boiler No. 1 635 x 10^6 BTU/hr.	See Note		90 mw
(2) Boiler No. 2 635 x 10^6 BTU/hr.			90 mw
(3) Boiler No. 3 635 x 10^6 BTU/hr.			
(4) Boiler No. 33 2546.6 x 10^6 BTU/hr.			291 mw

Note: Boiler Nos. 1, 2, and 3 feed a common header, which in turn feeds two turbine generators.

5. *Nature and Quantity of Present Emissions Requiring Variances*

(a) PARTICULATE MATTER—Based upon stack emission tests, particulate matter emissions are presently 0.513 pounds per million BTU from Boiler No. 1, 0.586 pounds per million BTU from Boiler No. 2, 0.787 pounds per million BTU from Boiler No. 3, and 0.210 pounds per million BTU from Boiler No. 33.

(b) SULFUR COMPOUND EMISSIONS—Based upon the percentages of sulfur in the coal (2.6%), the BTU per pound of coal (12,620 BTU/lb.), and an average of 90% of the sulfur in the coal being emitted as sulfur dioxide, the present sulfur dioxide emission is 3.71 pounds per million BTU.

6. *Sections of Regulations for Which Variance Is Sought and Duration Thereof*

(a) PARTICULATE MATTER EMISSIONS—Title 25, Part I, Subpart C, Article III, Chapter 123, Section 123.11. It is requested that the variance be granted for a period ending on January 18, 1974, for Boilers Nos. 1, 2, and 3, and for a period ending November 1, 1973, for Boiler No. 33.

(b) VISIBLE EMISSIONS—Title 25, Part I, Subpart C, Article III, Chapter 123, Section 123.41. It is requested that the variance be granted for periods equal to the periods listed in Subpart (a), above.

(c) SULFUR COMPOUND EMISSIONS—Title 25, Part I, Subpart C, Article III, Chapter 123, Section 123.22. It is requested that the variance be granted for a period ending on January 18, 1974, for Boilers Nos. 1, 2, and 3, and for a period ending on June 30, 1985, for Boiler No. 33.

The duration of the variance and the completion dates set forth in (a), (b), and (c), above, are based upon normal operating conditions and may be extended in the event of war, natural disaster, unforeseen circumstances, or other causes beyond the reasonable control of West Penn Power Company.

7. *Plan for Compliance Including Schedule for Completion of Intermediate Steps*

(a) Boilers Nos. 1, 2, and 3—Particulate Matter and Sulfur Compound Emissions.
Boilers Nos. 1, 2, and 3 will be converted to oil firing. The compliance construction schedule is presently planned as follows:

Engineering Preparation	Complete
Complete Placement of All Contracts	Complete
Begin Construction	Complete
Begin Outage for Tie-in	Nov. 3, 1973
In Service	Dec. 23, 1973
Complete Operating Adjustments	Jan. 18, 1974

(b) Boiler No. 33

(1) Particulate Matter and Visual Emissions

Pursuant to Consent Order No. 71-367 dated June 3, 1971, and at a cost of $1.5 million, Petitioner constructed a new electrostatic precipitator. This electrostatic precipitator, placed in service on February 8, 1973, was designed to meet current particulate and visual emission standards using a coal supply having a sulfur content of from 2% to 3%. Visual observations indicate the particulate and visual emission standards are being met. Performance tests to confirm these observations are scheduled for mid-June 1973.

Petitioner intends to conduct flue gas conditioning tests with a lower sulfur coal during the period from July 1, 1973, to October 31, 1973, which tests may result in emissions exceeding the particulate and visual emission standards. Petitioner therefore requests variances from these standards until November 1, 1973.

(2) Sulfur Compound Emissions

The existing coal supply currently having an average monthly range from 1.9% to 2.6% sulfur will be utilized until July 1, 1973, in order to complete the performance tests of the new electrostatic precipitator. From July 1, 1973, until October 31, 1973, Petitioner will, on a test basis, burn Kentucky coal having an average sulfur content of 0.88%.

Use of the lower sulfur coal will result in lowering collecting capabilities of the electrostatic precipitator and resultant noncompliance with existing particulate and visual emission standards. Petitioner will attempt to counteract the lowering of collection capability by chemical treatment of the flue gas (gas conditioning). After November 1, 1973, Petitioner will comply with particulate and visual emission standards and will utilize the lowest sulfur coal consistent with this goal. At that time Petitioner will, if necessary, proceed with either one or the other of the following alternatives to reduce ground-level concentrations of sulfur dioxide.

Alternative I

Upon receiving necessary approval, Petitioner will install a sufficiently tall chimney (tall stack)—in excess of 700 feet—to assure that ground-level concentrations from Petitioner's stack will comply with federal ground-level ambient-air standards and to assure that the effective stack height will pierce all possible ground-level stagnation conditions in the Monongahela Valley air basin. Petitioner will also install ground-level monitoring stations to monitor air quality. The cost of the tall stack will be approximately $4.3 million, and the stack will be in use 41 months after receipt of final approval for its construction and use. Upon completion of the tall stack, Petitioner will comply with all applicable ground-level concentration standards and regulations but will require a ten-year vari-

ance from existing emission standards to amortize the cost of new equipment.

Alternative II

Petitioner will install sulfur-control equipment as soon as commercially proven, reliable, and environmentally acceptable equipment is available. Petitioner does not believe it would serve any interest to duplicate experimental projects already under way at other installations until such projects are proven. However, Petitioner will continue to investigate all processes for sulfur removal not presently being tested, and if any such processes not presently being tested have, in Petitioner's estimation, a sufficiently high chance for success, Petitioner will, with the consent of the Department, install such test facilities. The cost of a scrubber type of sulfur-control device would be in the range of $23 to $30 million and under present supply conditions would require approximately 53 months to engineer and construct.

Therefore, under Alternative I, Petitioner would comply with all applicable ground-level concentration standards by April 1, 1977, but would require a variance from existing emission regulations until June 30, 1985, in order to amortize the cost of the facility. Under Alternative II, Petitioner would require a variance from existing emission standards and ground-level concentration standards at least until April 1, 1978, and possibly for an extended period thereafter, dependent upon the development of technology and future supply conditions.

(c) Quarterly reports will be submitted showing status of the oil conversions, the test program, and any construction undertaken under Alternative I or II.

8. *Reasons Compliance Plan Cannot Be Attained Prior to Date of Petitioner's Plan*

Petitioner's plan is predicated (1) upon engineering and fabrication lead times of Petitioner and independent suppliers, (2) upon development of new technology, (3) upon availability of fuel supplies, (4) upon Petitioner's system outage schedules which must be compatible with outages at other stations on the system for installation of environmental control devices, and (5) upon Petitioner's duty to render reasonably continuous reliable electric service to its customers.

9. *Notice*

Petitioner has complied with the notice provisions of Chapter 141 and has supplied the Department with proof of publication. Petitioner believes the within amendments require no further notice under Chapter 141.

WHEREFORE, Petitioner requests the Department of Environmental Resources to grant Petitioner the Variance set forth in Paragraph 6, above.

Date: June 7, 1973

WEST PENN POWER COMPANY
By C. G. McVAY

Vice President, System Power Supply,
Allegheny Power Service Corporation,
Agent for West Penn Power Company

APPENDIX "B"

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRISBURG, PENNSYLVANIA

IN RE THE MATTER OF: WEST PENN POWER COMPANY MITCHELL STATION, Appellant	DOCKET NO. Appeal from Order No. 73-708-V

Notice of Appeal

AND NOW comes the West Penn Power Company by its attorneys Harold R. Schmidt, Lawrence A. Demase, Edwin J. Strassburger, and Rose, Schmidt and Dixon and files this appeal from the action of the Department of Environmental Resources described herein:

1. The West Penn Power Company ("West Penn") is a Pennsylvania corporation and public utility operating under authority granted to it pursuant to the Pennsylvania Public Utility law.

2. The Mitchell Power Station ("Mitchell") is a fossil fired steam electric generating facility of West Penn located in Courtney, Union Township, Washington County, Pennsylvania. Mitchell consists of four boilers and three related turbo-generators. Boilers Nos. 1, 2, and 3 each has a rated capacity of 635 x 10^6 BTU/hr. and feeds a common header which in turn feeds turbo-generator units Nos. 1 and 2, each of which has a December normal seasonal operating capacity of 90 megawatts. Boiler No. 33 has a rated capacity of 2546.6 x 10^6 BTU/hr. and feeds turbo-generator No. 33, which has a December normal seasonal operating capacity of 291 megawatts.

3. On September 15, 1972 West Penn filed a petition for a variance from the visible, particulate and sulfur compound air emission limitations of Sections 123.11, 123.22 and 123.41 of Chapter 123 of the Rules and Regulations of the Department of Environmental Resources. This petition was amended by West Penn on June 7, 1973.

4. West Penn's amended petition as filed on June 7, 1973 requested a variance from the aforesaid particulate and visible emission regulations until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until November 1, 1973 for Boiler No. 33. The amended petition also requested a variance from sulfur compound limitations until January 18, 1974 for Boilers Nos. 1, 2 and 3 and until June 30, 1985 for Boiler No. 33.

5. By letter dated September 19, 1973 the Department of Environmental Resources ("Department") conditionally granted West Penn its requested variances for Boilers Nos. 1, 2 and 3, and a variance from particulate emission limitations for Boiler No. 33. The Department denied, however, West Penn's requested variance from sulfur compound limitations for Boiler No. 33, and instead granted West Penn a limited variance until June 30, 1976. Each of the above variances was conditioned upon compliance with an integrated order of the Department directing West Penn to file a specified schedule leading to the installation of sulfur control equipment for Boiler No. 33 by June 1, 1976. A copy of the Order Granting Temporary Variance ("Order") is attached hereto and marked Exhibit "A". It is from the foregoing Order of the Department which West Penn appeals.

6. West Penn is aggrieved by the action of the Department in issuing the Order in the following manner:

a. A commercially proven, reliable and environmentally acceptable sulfur control device is not presently available to be constructed and installed for use on Boiler No. 33, and even if available could not be constructed and operated by June 30, 1976.

b. If West Penn were to install presently available sulfur control equipment for use on Boiler No. 33 it could not achieve compliance with the Department's sulfur compound emissions regulations in a reliable manner, and would unreasonably interfere with West Penn's responsibility as a public utility to provide continuous and reliable electrical power to its customers in the most economical manner.

c. If a commercially proven, reliable and environmentally acceptable sulfur removal device were available for use on Boiler No. 33, it would require substantial amounts of electrical power for its own operation, reducing available electrical power for use by West Penn's customers.

d. In issuing the Order the Department failed to take into consideration the fact that there is not sufficient space at Mitchell to install presently known sulfur control equipment and related facilities for use on Boiler No. 33, and at the same time adequately to maintain sufficient coal reserves, oil storage facilities, water pollution control facilities and other facilities necessary for the operation of the Mitchell Station.

e. In issuing the Order the Department failed to take into consideration the fact that a tall stack as proposed by West Penn would reduce ground

level concentrations of sulfur oxides from Boiler No. 33 to a greater extent than a sulfur control device that would meet the emission limitations set forth in Section 123.22 of the Rules and Regulations of the Department of Environmental Resources.

f. In issuing the Order the Department failed to take into consideration the fact that a lack of sufficient space at Mitchell for disposal of sludge during the remaining life of Boiler No. 33 will mean that a method will have to be developed to dewater and fix such sludge so that it can be hauled away for use in a landfill or similar disposal area.

7. West Penn objects to the action of the Department in issuing the Order on the following grounds:

a. The enabling legislation upon which the Order is premised, and the Rules and Regulations issued pursuant thereto, do not empower the Department to issue such an Order.

b. The Order is null and void because the prerequisites of Section 12(c) of the Air Pollution Control Act, as amended, 35 P.S. § 4012(c), to issuance of such an Order have not been complied with by the Department.

c. The Order of the Department of Environmental Resources is invalid because:

1. It was promulgated pursuant to an unlawful delegation of legislative authority;

2. In the circumstances results in a taking of property without due process of law and without just compensation;

3. In the circumstances constitutes an undue burden on interstate commerce;

4. In the circumstances is in direct conflict with the Public Utility Law of the Commonwealth of Pennsylvania;

5. In the circumstances it is arbitrary and unreasonable;

6. Imposes a standard which in the circumstances is not attainable;

7. Imposes a standard which even if attainable in the circumstances is not necessary to achieve the goals which the Air Pollution Control Act and the Rules and Regulations of the Department of Environmental Resources seek to attain;

8. It was promulgated in a manner which denied West Penn procedural and substantive due process.

d. There is no reasonable basis in fact for the Department's finding that the granting of the requested variance based upon the plan submitted by West Penn would prevent or interfere with the attainment or maintenance of ambient air quality standards within the time prescribed by the Clean Air Act, as amended (42 U.S.C. 1857 et seq.), and regulations promulgated thereunder.

e. There is no reasonable basis in fact for the Department's finding that sulfur control equipment capable of reducing emissions from Boiler No. 33 which is commercially proven, reliable and environmentally acceptable could be constructed and installed at the Mitchell Station by June 1, 1976.

f. There is no reasonable basis in fact for the Department's finding that Alternate I of West Penn's amended variance petition does not provide for compliance with Section 123.22 in a reasonable time period.

g. There is no reasonable basis in fact for the Department's finding that the intermediate and completion dates set forth in West Penn's amended variance petition indicate that West Penn does not intend to effect the control of particulate and sulfur oxide emissions as quickly as is reasonably practicable.

h. Sections 141.2 and 141.4 of Chapter 141 of the Rules and Regulations of the Department of Environmental Resources entitled "Variances and Standards" are invalid because they:

1. In the circumstances result in the taking of property without due process of law and without just compensation;

2. In the circumstances constitutes an undue burden on interstate commerce;

3. In the circumstances are arbitrary and unreasonable;

4. In the circumstances impose requirements, which are not necessary to achieve the goals which the Air Pollution Control Act seeks to attain.

i. The Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. § 4001, et seq. is unconstitutional because:

1. It does not describe with sufficient particularity the powers delegated to the Department;
2. In the circumstances it constitutes an invalid delegation of legislative authority;
3. In the circumstances results in the taking of property without due process of law and without just compensation;
4. In the circumstances constitutes an undue burden on interstate commerce.

j. The Department failed to condition its Order upon the development of sulfur control equipment as provided in Section 141.3(3) of the Rules and Regulations of the Department of Environmental Resources.

k. The Department failed to make provision in its Order for strikes, breakdowns, equipment delays, acts of God, governmental actions beyond West Penn's control, or other circumstances beyond West Penn's control which might delay installation of a sulfur removal device.

8. The undersigned hereby certify that a copy of this appeal has been served on the officer of the Department of Environmental Resources responsible for the action appealed and on the Bureau of Administrative Enforcement, P. O. Box 2351, 709 Health and Welfare Building, Harrisburg, Pennsylvania 17120.

9. The undersigned is authorized to receive any pleading filed in this matter on behalf of West Penn.

Respectfully submitted,

ROSE, SCHMIDT AND DIXON
By HAROLD R. SCHMIDT
By LAWRENCE A. DEMASE
By EDWIN J. STRASSBURGER

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EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Fulton National Building
200 North Third Street
P. O. Box 2063
Harrisburg, PA 17120

September 19, 1973

CERTIFIED MAIL #143736

West Penn Power Company
800 Cabin Hill Drive
Greensburg, Pennsylvania 15601

Attention: Mr. Ralph J. Gunkle, Jr.
Secretary-Treasurer

Order No. 73-708-V

Gentlemen:

ORDER GRANTING TEMPORARY VARIANCE

Pursuant to Chapter 141, Section 141.2 of the Rules and Regulations of the Department of Environmental Resources, the West Penn Power Company submitted a petition for a temporary variance dated September 15, 1972 and amended on June 7, 1973 requesting a variance from the air contaminant emissions limitations of Sections 123.11, 123.22 and 123.41 of Chapter 123 for the four boilers located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania. Said petition indicated that said source is presently emitting air contaminants in violation of the limitations set forth in Sections 123.11, 123.22 and 123.41

and is causing air pollution as defined in the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S., §4001, et seq.

The petition as amended seeks a variance from the particulate matter and visible emissions limitations of Sections 123.11 and 123.41 until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until November 1, 1973 for Boiler No. 33. The petition also seeks a variance from the sulfur compound emissions limitations of Section 123.22 until January 18, 1974 for Boilers Nos. 1, 2 and 3, and until June 30, 1985 for Boiler No. 33. Boiler Nos. 1, 2 and 3 are to be converted to oil firing by January 18, 1974. Two alternate plans have been proposed for control of sulfur dioxide emissions from Boiler No. 33. Alternate I provides for the installation of a stack which the company believes would achieve compliance with the ambient air quality standards only, by April 1, 1977 but would not achieve compliance with the emission standards until June 30, 1985. Alternate II provides for the installation of sulfur dioxide control equipment with compliance being obtained by April 1, 1978 or an extended period thereafter.

Upon a review of the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and accompanying materials, testimony (if any) received at public hearing, and upon other information available to the Department dealing with the availability of technology to control sulfur dioxide emissions, the Department finds that:

1. The granting of such a variance may prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder.

2. Alternate I does not provide for compliance with Section 123.22 in a reasonable time period and is therefore not acceptable to the Department.

3. The granting of the variance, as requested, for implementation of Alternate II is not reasonable inasmuch as the intermediate dates, and the completion date set forth in the petition do not indicate that the company intends to effect the control of the source as quickly as is reasonably practicable.

NOW, THEREFORE, this 19th day of September, 1973, the Department hereby grants a variance and further orders that the West Penn Power Company, its successors and assigns, shall:

(a) on or before June 30, 1976 complete the implementation of Alternate II of the control plan set forth in the aforementioned amended petition for a variance, which plan is hereby incorporated herein and made a part hereof;

(b) complete implementation of the control plan with respect to the control of particulate matter and sulfur compound emissions from Boilers Nos. 1, 2 and 3 and particulate matter emissions from Boiler No. 33 on or before the dates specified in the amended petition which are respectively January 18, 1974 and November 1, 1973;

(c) on and after January 18, 1974 operate its Boilers Nos. 1, 2 and 3 located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania, in such a manner as to maintain the emissions of air contaminants to within all applicable limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources;

(d) on and after November 1, 1973 operate its Boiler No. 33 located at its Mitchell Power Station in Courtney, Union Township, Washington County, Pennsylvania, in such a manner as to maintain the emissions of particulate matter and visible emissions to within all applicable limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources;

(e) on and after June 30, 1976 operate its aforementioned Boiler No. 33 in such a manner as to maintain the emissions of sulfur compounds to within the limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; and,

(f) submit quarterly progress reports to the Department of Environmental Resources, commencing on October 1, 1973 and continuing thereafter until compliance with paragraph (a) of this order is achieved.

The foregoing variance is granted on condition that paragraphs (a), (b), (c), (d), (e) and (f) of the foregoing order are complied with within the time specified for compliance and on the following further conditions:

(1) On or before April 1, 1974, details of the company's plans shall be submitted to the Department, setting forth a detailed description of the methods or devices to be used to control the sulfur dioxide emissions from Boiler No. 33 and a schedule indicating the dates upon which each intermediate step of the plan is to be completed.

(2) Purchase orders for equipment necessary for compliance with paragraph (a) of this order shall be placed no later than July 1, 1974, and proof thereof shall be submitted to the Department within five (5) days after such orders are placed.

(3) On-site construction or installation of emission control equipment shall be initiated on or before December 1, 1974.

(4) On-site construction or installation of emission control equipment shall be completed on or before June 1, 1976.

(5) Specifications for a continuous sulfur dioxide and percent opacity stack monitoring and recording system shall be submitted to the Department for approval on or before December 1, 1974.

(6) Commencing July 31, 1975, quarterly monitoring reports containing sulfur dioxide concentrations and percent opacity readings shall be submitted to the Department in accordance with guidelines provided by the Department.

Compliance with the foregoing order shall be obtained in a manner that will not violate the Environmental Protection Statutes and Rules and Regulations promulgated thereunder.

Nothing contained in this order shall be construed to prevent or limit the application of the provisions of Chapter 137 of the Rules and Regulations of the Department of Environmental Resources which relates to air pollution episodes.

Chapter 127 of the Rules and Regulations of the Department of Environmental Resources requires plan approval prior to the construction or modification of an emission source. Applications for such plan approval are enclosed. Please complete these forms and return them, in duplicate, with the plan details required in special condition (1) of this order to Mr. Nicholas Pazuchanics, Regional Air Pollution Control Engineer, Room 850, Kossman Building, 100 Forbes Avenue, Pittsburgh, Pennsylvania 15222.

Any questions in connection with this action of the Department of Environmental Resources, as well as all progress reports, should be directed to the Bureau of Air Quality and Noise Control, Department of Environmental Resources, Fulton National Building, 200 North Third Street, Post Office Box 2063, Harrisburg, Pennsylvania 17120.

Very truly yours,

JAMES K. HAMBRIGHT, Chief
Division of Abatement & Compliance
Bureau of Air Quality & Noise Control

Attachments

Notice of Appeal
Rules of Practice and Procedure
Rules & Regulations of the Department
of Environmental Resources
Applications for Chapter 127
Exhibit "A"—Petition for Variance

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WEST PENN POWER COMPANY, a corporation, Plaintiff, v. RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania, Defendants.	Civil Action No. 73-1083

Amended Complaint

AND NOW, comes the Plaintiff West Penn Power Company by its attorneys Rose, Schmidt and Dixon and brings this cause of action against the Defendants whereof the following is a statement:

1. Plaintiff, West Penn Power Company, is a Pennsylvania corporation and public utility organized and operating under the authority granted to it pursuant to the Pennsylvania Public Utility Law, 66 P.S. 1101 *et seq.,* and having its principal place of business in Greensburg, Pennsylvania. West Penn Power provides electrical utility service for approximately 470,000 customers in the southwestern and north central portions of the Commonwealth of Pennsylvania.

2. Pursuant to its authority under the Pennsylvania Public Utility Law, 66 P.S. 1101 *et seq.,* Plaintiff

operates the Mitchell Power Station, a fossil-fired electric generating facility in Washington County, Pennsylvania.

3. Defendant, Russell Train, is the Administrator of the Environmental Protection Agency of the United States of America ("Administrator" herein) charged with the responsibility under the Clean Air Act, 42 U.S.C., §1857 *et seq.* of approving or disapproving plans of the States for the implementation of national ambient air quality standards, and in cooperation with the States, of the enforcement of plans approved by the Administrator for the implementation of national ambient air quality standards.

4. Defendant, Department of Environmental Resources of the Commonwealth of Pennsylvania ("Department" herein) is an administrative agency of the Commonwealth of Pennsylvania authorized by the Pennsylvania Air Pollution Control Act, 35 P.S. 4000 *et seq.* to prepare and develop a comprehensive plan for the control and abatement of air pollution in the Commonwealth of Pennsylvania.

5. Defendant, Maurice K. Goddard, is Secretary of the Department of Environmental Resources, charged with exercising the powers and performing the duties vested in the Department.

6. This Court's jurisdiction is based upon the Clean Air Act, 42 U.S.C. §1857 *et seq.,* specifically 42 U.S.C. §1857h-2; The Administrative Procedure Act, 5 U.S.C. §701 *et seq.;* The Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; and 28 U.S.C. §1337.

7. The Clean Air Act, 42 U.S.C. §1857 *et seq.,* is an Act of Congress regulating commerce.

8. On information and belief plaintiff avers that the Administrator of the Environmental Protection Agency has approved the plan submitted to it by defendant Department for the implementation of national ambient air quality standards in the Commonwealth of Pennsylvania. The plan approved by the defendant Administrator included the rules and regulations of the defendant Department with respect to the attainment of national primary ambient air quality standards for particulate matter and sulfur oxides as well as rules and regulations with respect to variances from emission standards for particulate matter and sulfur oxides.

9. On or about September 15, 1972, pursuant to Chapter 141 of Title 25 of the Rules and Regulations of the Department of Environmental Resources, 25 Pa. Code 141, plaintiff petitioned the defendant Department for a variance from the particulate matter and sulfur compound emission limitations contained in the Commonwealth of Pennsylvania's plan for the implementation of national primary ambient air quality standards for Boiler No. 33 of plaintiff's Mitchell Power Station, and for variances from the particulate matter and sulfur compound emission limitations for three other boilers at the Mitchell Station. The petition for variance was amended on or about June 7, 1973. A copy of plaintiff's Amended Variance Petition is attached hereto and marked Exhibit "A".

10. Plaintiff proposed in its amended petition for variance from the aforesaid sulfur compound emission limitations for Boiler No. 33 to reduce the ground level ambient concentrations of sulfur compounds emitted by the combustion of coal in Boiler No. 33 to a level sufficient to achieve national primary ambient air quality

standards through the use of coal with a sulfur content of .88 per centum and by the construction of a stack in excess of 700 feet in height as an alternative to the installation of a sulfur emission control device.

11. On or about September 13, 1973 the Regional Administrator of Region III of the United States Environmental Protection Agency, purportedly acting pursuant to Section 113(a)(1) of the Clean Air Act, notified the plaintiff that the Mitchell Power Station was in violation of the Commonwealth of Pennsylvania's plan for the implementation of national primary ambient air quality standards for sulfur oxides and particulate matter.

12. On or about September 19, 1973 the defendant Department, pursuant to Order No. 73-708-V, rejected plaintiff's proposal in its petition for variance to use a tall stack on Boiler No. 33 of the Mitchell Power Station for the attainment of the national primary ambient air quality standards for sulfur oxides, and directed plaintiff to install a sulfur emission control device on Boiler No. 33 of the Mitchell Power Station. A copy of the Order, which has been appealed to the appropriate administrative body, is attached hereto and marked Exhibit "B".

13. Plaintiff believes and, therefore, avers that there are no sulfur emission control devices presently available for use on Boiler No. 33 of the Mitchell Power Station which will enable plaintiff to comply with the Department's sulfur oxide regulations.

14. Plaintiff believes and, therefore, avers that if it is required to install a sulfur emission control device on Boiler No. 33, the generating capacity and reliability

of the Mitchell Power Station will be substantially reduced and plaintiff's ability to maintain a continuous and reliable supply of electric power to its customers will be impaired.

15. Plaintiff believes and, therefore, avers that if it is required to install a sulfur emission control device on Boiler No. 33 of the Mitchell Power Station it may needlessly be forced to expend as much as twenty-three million dollars ($23,000,000) for principal capital investment (exclusive of costs related to waste disposal) and may incur additional unwarranted annual operating and capital costs (exclusive of costs related to waste disposal) in excess of six million five hundred thousand dollars ($6,500,000) for equipment which cannot be operated in an efficient, reliable or environmentally acceptable manner. This represents a 67% increase in annual ownership and production costs for the Mitchell Power Station alone, and costs of this magnitude would necessitate, at a minimum, a 5% rate increase to plaintiff's customers which plaintiff believes to be unjustified by any corresponding environmental benefit.

16. Plaintiff believes and, therefore, avers that a tall stack will reduce ground level concentrations of sulfur oxides to one-tenth (1/10) or less the ground level concentration of sulfur oxides resulting from the installation of a sulfur emission control device on Boiler No. 33 which would comply with the Commonwealth of Pennsylvania's sulfur emission limitations.

17. Plaintiff believes and, therefore, avers that if a throwaway or first generation sulfur emission control device were installed on Boiler No. 33, and operated continuously (plaintiff, however, believes that there are no sulfur emission control devices presently available which

can be operated reliably for an extended period and which would permit plaintiff to comply with the Department's sulfur oxide regulations), over the twenty-five (25) year life of Boiler No. 33 would produce approximately three (3) million tons of waste product, or enough waste product to cover an area of approximately eleven hundred (1100) acres to a depth of one foot; an area which would thereby needlessly be rendered useless for ordinary purposes unless a satisfactory process is developed to convert such waste products into a material that can be used or disposed of in a constructive and environmentally sound manner. Assuming that Boiler No. 33 of the Mitchell Power Station was operated at a constant load and the waste product produced by a sulfur emission control device had to be trucked away, it would require the use of approximately thirty-four (34) ten-ton trucks each day to accomplish the disposal of this material with the resultant waste of valuable economic and natural resources. Plaintiff further believes there is presently no satisfactory process which will convert waste products from a throwaway or first generation sulfur emission control device into a material that can be used or disposed of in a constructive and environmentally sound manner.

18. Plaintiff believes and, therefore, avers that if it is required to install a throwaway or first generation sulfur emission control device on Boiler No. 33 of the Mitchell Power Station that the disposal of the millions of tons of unstable waste product produced by such a device may lead to the pollution of ground waters at the disposal site by hazardous chemical materials unless a satisfactory process is developed to convert such waste products into a material that can be used or disposed of in an environmentally acceptable manner.

19. Plaintiff believes and, therefore, avers that if it is required to install a throwaway or first generation sulfur emission control device on Boiler No. 33 that the disposal of the millions of tons of unstable waste product produced by such a device may create a substantial safety hazard to those who come into contact with it and those who live in the vicinity of the disposal site unless a satisfactory process is developed to convert such waste products into a material that can be used or disposed of in a safe and environmentally acceptable manner.

20. On information and belief plaintiff avers that the defendant Administrator has interpreted the Clean Air Act, 42 U.S.C. 1857 et seq. as prohibiting the use of a tall stack as a primary method for the attainment of national primary ambient air quality standards for sulfur oxides.

21. Plaintiff believes, and therefore, avers that the defendant Administrator has exceeded his authority and has contravened the intent of the Congress of the United States by interpreting the Clean Air Act, 42 U.S.C. 1857, *et seq.* as prohibiting the use of a tall stack as a primary method for the attainment of national primary ambient air quality standards for sulfur oxides.

22. Plaintiff believes and, therefore, avers that the defendant Administrator's aforesaid interpretation of the Clean Air Act, 42 U.S.C. §1857 *et seq.* will result in an unconscionable waste of natural resources, will further aggravate the serious energy shortage now facing the nation, and will create unnecessary and unreasonable economic burden for plaintiff's customers without a corresponding benefit to the environment.

23. Plaintiff believes and, therefore, avers that the defendants Department and Goddard, because of the aforesaid interpretation of the Clean Air Act, 42 U.S.C. §1857 *et seq.* by the defendant Administrator, have failed to promulgate regulations permitting the use of a tall stack as part of Pennsylvania's plan for the implementation of national primary ambient air quality standards for sulfur oxides.

24. Plaintiff believes and, therefore, avers that defendants Department and Goddard, through their agents, servants, employees or attorneys, because of the aforesaid interpretation of the Clean Air Act, 42 U.S.C. §1857 *et seq.* by the defendant Administrator, rejected plaintiff's variance request.

25. Plaintiff believes and, therefore, avers that the defendants Department and Goddard through their agents, servants, employees or attorneys, because of the aforesaid interpretation of the Clean Air Act, 42 U.S.C. §1857 *et seq.* by the defendant Administrator, ordered plaintiff to install a sulfur emission control device which will not permit plaintiff to comply with Pennsylvania's implementation plan with respect to sulfur oxides.

26. Plaintiff believes and, therefore, avers that the defendant Administrator has breached his non-discretionary statutory duties under Sections 108 and 110 of the Clean Air Act, 42 U.S.C. §§1857c-3 and 1857c-5. By failing to promulgate guidelines for an alternative method for the attainment of national primary ambient air quality standards for sulfur oxides in those cases where emission control devices will not effect compliance with the Pennsylvania implementation plan.

27. Plaintiff believes and, therefore, avers that defendant Administrator has breached his non-discre-

tionary duty under Section 113 of the Clean Air Act, 42 U.S.C. §1857c-8.

28. There is a substantial and actual justiciable controversy between plaintiff and defendants as to the aforesaid interpretation of the Clean Air Act, 42 U.S.C. 1857 et seq. and the authority of defendants with respect thereto, which cannot be resolved without subjecting plaintiff and its officers, agents and employees to substantial criminal and civil penalties.

WHEREFORE, plaintiff prays:

1. That the defendants be required to appear and answer this Amended Complaint.

2. For a decree declaring that the defendants are without right to reject plaintiff's plan for compliance with national primary ambient air quality standards for sulfur oxides by the use of tall stacks.

3. For a decree declaring that the plaintiff is not in violation of the Commonwealth of Pennsylvania's plan for the control and abatement of air pollution approved by the Administrator pursuant to the provisions of the Clean Air Act, 42 U.S.C. 1857 *et seq.*

4. For a preliminary injunction enjoining the defendant Administrator and all in privity with said defendant from proceeding to enforce the notice of violation issued pursuant to Section 113 of the Clean Air Act.

5. For a preliminary injunction enjoining defendants Department and Goddard and all in privity with said defendants from proceeding to enforce their Order directing plaintiff to install a sulfur emission control device.

6. For permanent injunctions of the same purport and tenor as the preliminary injunctions herein prayed for.

7. For a Judgment for its costs, disbursements and reasonable attorney's fees incurred by plaintiff herein.

8. For such other and further relief as this Honorable Court may deem appropriate.

Respectfully submitted,

ROSE, SCHMIDT AND DIXON
By Harold R. Schmidt
By Lawrence A. Demase

919 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Plaintiff,
West Penn Power Company

Of Counsel:

Thomas K. Henderson
West Penn Power Company
Cabin Hill
Greensburg, Pennsylvania 15601

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WEST PENN POWER COMPANY, a corporation, Petitioner vs. RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, Respondent	Docket No. 75-1259

Petition for Review

Harold R. Schmidt
Lawrence A. Demase
Edwin J. Strassburger
ROSE, SCHMIDT AND DIXON

Attorneys for Petitioner

West Penn Power Company
919 Oliver Building
Pittsburgh, Pennsylvania 15222

AND NOW, comes the Petitioner, WEST PENN POWER COMPANY, by its attorneys, Rose, Schmidt and Dixon, and files the within Petition for Review whereof the following is a statement:

1. Petitioner, WEST PENN POWER COMPANY, is a Pennsylvania corporation and public utility organized and operating under the authority granted to it pursuant to the Pennsylvania Public Utility Law, 66 P.S. 1101 *et seq.*, and having its principal place of business in Greensburg, Pennsylvania. Petitioner provides electrical

utility service for approximately 470,000 customers in the southwestern and north central portions of the Commonwealth of Pennsylvania.

2. West Penn operates the Mitchell Power Station, an electric generating facility located in Union Township, Washington County, Pennsylvania, comprised of units Nos. 1 and 2 (Boilers 1, 2 and 3) each having a December normal seasonal operating capacity of 90 megawatts and unit No. 3 (Boiler 33) having a December normal seasonal operating capacity of 291 megawatts. Boiler Nos. 1, 2 and 3 are oil fired. Boiler No. 33 is coal fired.

3. Respondent, RUSSELL TRAIN, is the Administrator of the Environmental Protection Agency of the United States of America (hereinafter "Administrator" and "EPA") charged with responsibility under the Clean Air Act, 42 U.S.C. §1857 *et seq.* for approving or disapproving plans of the States for the implementation of national ambient air quality standards, and in cooperation with the States, for the administration of such plans approved by him.

4. On May 31, 1972, pursuant to his specific authority under Section 110 of the Clean Air Act, 42 U.S.C. §1857c-5, the Administrator approved Pennsylvania's implementation plan as set forth in 25 Pa. Code §121.1 *et seq.*, which included, *inter alia,* emission limitations for sulfur oxides. In approving the Pennsylvania implementation plan, the Administrator failed to take into consideration whether said plan was technologically and economically feasible generally, or as applied to the Mitchell Power Station specifically. See, *St. Joe Minerals Corporation v. Environmental Protection Agency,* .... F.2d .... (3rd Cir. 1975).

5. West Penn hereby petitions the Court for review of the order of May 31, 1972, pursuant to Section 307 (b) (1) of the Clean Air Act, 42 U.S.C. §1857h-5(b) (1), which provides in pertinent part:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, *or after such date if such petition is based solely on grounds arising after such 30th day.*" (Emphasis added).

6. The instant petition, filed more than 30 days after such approval, challenges only the sulfur compound limitations contained in Section 123.22 of the approved Pennsylvania implementation plan as the same is applied to the Mitchell Power Station, and is based solely on grounds arising since said 30 day period. These new grounds, however, can only be understood in relation to various state and federal action with respect to the Mitchell Power Station and Boiler No. 33 which has taken place during the intervening time.

7. On or about September 15, 1972, as contemplated by the approved Pennsylvania implementation plan, specifically 25 Pa. Code §141.5, West Penn filed with the Pennsylvania Department of Environmental Resources (hereinafter "DER") a Petition for Variance from the sulfur oxide standards contained in the implementation plan. Said petition, the filing of which operated as a stay of prosecution for a period of at least one year, requested additional time to bring Boiler No. 33 into compliance with those standards by either converting to low sulfur

oil, or by the installation of a sulfur emission control device if a commercially proven and reliable one became available for use at the Mitchell Power Station. A copy of West Penn's Petition for Variance is attached hereto as Exhibit "A".

8. On or about June 7, 1973, no disposition having been made of its variance petition described above, West Penn filed an Amended Petition for Variance with the DER. Said amended petition was precipitated by the increased cost of low sulfur fuel oil, which development had rendered far more difficult and unattractive the oil firing proposed for Boiler No. 33 in the original petition. In place of an oil conversion, as an interim measure, West Penn proposed the construction of a tall stack to insure attainment of national ambient air quality goals and the burning of low sulfur coal until such time as a reliable and environmentally sound sulfur emission control device became commercially available for use on Boiler No. 33. A copy of West Penn's Amended Petition for Variance is attached hereto as Exhibit "B".

9. On or about September 13, 1973, the Regional Administrator of Region III of the EPA, purportedly acting pursuant to Section 113(a) (1) of the Clean Air Act, 42 U.S.C. §1857c-8(a) (1), notified West Penn that the Mitchell Power Station was in violation of, *inter alia,* the sulfur emissions limitations of the Pennsylvania implementation plan.

10. On or about September 19, 1973, the DER granted West Penn a variance from its sulfur emission standards until June 30, 1976, rejecting, however, West Penn's proposal for the use of a tall stack on Boiler No. 33 and directing installation of a sulfur emission control device. Pursuant to the implementation plan and ap-

plicable statutes and regulations, this action of the DER was appealed to the Pennsylvania Environmental Hearing Board which, despite West Penn's efforts, has yet to conduct a hearing. West Penn believes that this lack of a hearing is a direct result of the issuance of the Notice of Violation referred to in Paragraph 7 above, as well as of the subsequent issuance of a compliance order as set forth in Paragraph 13.[1]

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1. On December 20, 1973, West Penn filed a complaint for declaratory and equitable relief against the Administrator and the DER in the United States District Court for the Western District of Pennsylvania. Said complaint sought, *inter alia,* a decree that by virtue of the grant of a variance by the DER West Penn was not in violation of the Pennsylvania implementation plan and that construction of a tall stack on Boiler No. 33 was the only method then available for achieving national ambient air quality goals. An amended complaint, adding the Secretary of the DER as a defendant and asserting additional jurisdictional grounds, was subsequently filed.

On June 19, 1974, the District Court dismissed the amended complaint for lack of jurisdiction holding, relying on *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349 (3rd Cir. 1972), *cert denied,* 409 U.S. 1125, that the issues presented by West Penn should have been raised in an appeal to this Honorable Court in June of 1972 pursuant to Section 307 of the Clean Air Act. Following the denial of its Motion for Reconsideration, West Penn filed an appeal with this Honorable Court on September 11, 1974, docketed at No. 74-2050.

On February 25, 1975, in response to the Administrator's issuance of a compliance order referred to in Paragraph 13, *infra,* West Penn filed a Motion for Injunction Pending Appeal. As a result of the Administrator's agreement to amend that compliance order, which was in fact done on March 5, 1975, the Court directed that disposition of the motion be consolidated with that on the merits, presently scheduled for April 28, 1975.

11. By the express terms of the Pennsylvania implementation plan, all sources were required to be in compliance with the standards contained therein immediately upon approval on May 31, 1972. It was generally recognized, however, that immediate compliance for a great many sources, including West Penn's Boiler No. 33, was physically impossible, and that the reasonableness of the implementation plan was necessarily dependent upon subsequently issued compliance schedules tailored to individual source capabilities. In fact, compliance schedules were submitted by Pennsylvania and approved by the Administrator for a great many sources. 40 C.F.R. §2036. The grant of a variance, however, for Boiler No. 33 by the DER on September 19, 1973 was never submitted as a compliance schedule.

12. Between October 18, 1973 and November 2, 1973, the EPA held a public conference to investigate, *inter alia,* the state-of-the-art and availability of sulfur emission control devices. West Penn presented testimony at this conference, which constituted the Agency's first public consideration of such devices. See, *Duquesne Light v. EPA,* 481 F.2d 1 (3rd Cir. 1973).

13. On December 19, 1974, following numerous meetings with representatives of Region III of the EPA, and pursuant to a public solicitation for proposals, West Penn offered to participate, in cooperation with the

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West Penn wishes to state that the filing of the within petition is not intended as a waiver of the contentions raised in the appeal presently pending, specifically, that the District Court has jurisdiction to consider the invalidity of the Notice of Violation and that denial of a hearing on all of West Penn's claims has resulted in a denial of due process. West Penn believes that the two proceedings, although related, are complementary rather than mutually inconsistent.

EPA, in the development of a regenerative sulfur emission control device for Boiler No. 33. A copy of West Penn's offer is attached hereto as Exhibit "C". On February 20, 1975, while this offer was still pending, West Penn received a compliance order, purportedly issued by the Administrator pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. §1857c-8(a)(1) which order required submission of a plan for reducing sulfur emissions from Boiler No. 33 to the level required by the Pennsylvania implementation plan by March 1, 1976, if West Penn elected to switch to oil, or by December 31, 1978, if West Penn elected to install a desulfurization device.[2]

14. Viewing the instant petition in light of the foregoing, West Penn believes and therefore avers that the following circumstances, not present within 30 days of the Administrator's approval of the Pennsylvania implementation plan on May 31, 1972, support the jurisdiction of this Court to review the reasonableness of that plan:

(a) Conversion of Boiler No. 33 to oil, proposed in West Penn's original Petition for Variance to the DER as the only effective method then available for complying with Pennsylvania's implementation plan, has since been rendered impractical, if not impossible, by the following developments:

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2. West Penn is no longer being considered for participation in the EPA's program for the development of an advanced sulfur emission control device. See Commerce Business Daily, March 10, 1975. Although the Contract Management Division of the EPA has not advised West Penn that its participation was rejected because of the issuance of the February 20, 1975 Compliance Order, West Penn believes that that action at least indirectly foreclosed consideration of West Penn's offer.

(1) As a result of the Mideast War of October, 1973 and resulting Arab oil embargo, and subsequent policies of the Arab oil-producing nations, the cost of oil has risen dramatically. No. 6 fuel oil, approximately 11.7¢/gal. in September, 1972, cost 39.9¢/gal. in January, 1975. Assuming an equivalent load factor, conversion of Boiler No. 33 from coal to oil at present rates would increase West Penn's annual fuel costs for the Mitchell Power Station in excess of $25,000,000 per year.

(2) Since June, 1972, the availability of oil has decreased sharply. As a result, West Penn may not be able to obtain an adequate long-term commitment of sufficient quantities to warrant a conversion to oil. Even if such a commitment could be obtained, domestic refining capacity is inadequate to guarantee a supply of fuel oil. Consequently, West Penn would be forced, in all probability, to utilize off-shore supply and refining capacity and to transport its fuel supply from off-shore facilities. Furthermore, West Penn would likely be required to finance, either through capital funding or increased unit prices, the construction of necessary refining capacity. The above constraints would result in extraordinary and unreasonable expense and necessitate substantial rate increases to West Penn's customers.

(3) Assuming price and supply obstacles could be overcome, recent federal legislation operates as a severe restraint, and possibly precludes, West Penn's option to convert

Boiler No. 33 to oil. See, e.g., The Energy Supply and Environmental Coordination Act of 1974, P.L. 93-319; Executive Order 11-748; Federal Energy Office Order 3 of February 5, 1974.

(4) As reflected in President Gerald Ford's recent State of the Union Address on January 15, 1975, conversion of Boiler No. 33 to oil would be contrary to the national energy policy. Specifically, the President stated that the goals of that policy are, *inter alia,* to reduce foreign oil imports one million barrels per day by the end of 1975 and two million barrels by the end of 1977; to eliminate completely by 1985 United States dependence on foreign oil supplies; and to encourage the construction of power plants that do not use natural gas or oil.

(b) Installation of a sulfur emission control device, proposed by West Penn as an alternate method of compliance with the Pennsylvania implementation plan in West Penn's amended Petition for Variance for the Mitchell Power Station, if one were commercially available, has been rendered impracticable, if not impossible, by the following developments occurring subsequent to June 30, 1972:

(1) An effective solution to the problem of waste disposal from a so-called "throw-away" sulfur emission control device,[3] pro-

3. As used herein, a throw-away sulfur emission control device is one which produces an unusable waste by-product and which requires a constant addition of the scrubbing agent to the system. Such devices are sometimes referred to as first generation scrubbers.

posed for installation on Boiler No. 33, which was anticipated in June of 1972, has not yet been developed. It is estimated that over the twenty-five (25) years life of Boiler No. 33 such a device would create approximately 3 million tons of waste product, or enough to cover 1100 acres to a depth of one foot. Areas utilized for waste disposal would be rendered useless for ordinary purposes. Because of severe space limitations at the Mitchell Power Station, on-site waste disposal is totally foreclosed. The myriad obstacles to off-site disposal have not been overcome.[4]

(2) "Regenerative" sulfur emission control devices,[5] which may obviate problems of

4. Off-site waste disposal would be prohibited, in the absence of an overriding order by the Pennsylvania Public Utility Commission, by the no-dumping ordinance of Union Township, where the Mitchell Power Station is located. Moreover, off-site disposal would also create actual or potential conflict with the Pennsylvania Solid Waste Management Act, 35 P.S. Supp. §6001 *et seq.*

Assuming the above preliminary obstacles were overcome, before proceeding to install a desulfurization system on Boiler No. 33, West Penn would be required to obtain a suitable land disposal site; an air pollution installation permit, an industrial waste permit, a solid waste management permit, a sedimentation and erosion control permit, and a dams and encroachment permit, all from the DER; a National Pollution Discharge Elimination System Permit from the EPA; and a certificate of public convenience and necessity to construct a pipeline to the disposal site, if condemnation is necessary.

5. As used herein, a regenerative sulfur emission control device is one which produces a usable by-product (e.g. elemental sulfur) and which recycles the scrubbing agent. Such devices are sometimes referred to as second generation scrubbers.

waste disposal, have not developed, as anticipated in June of 1972, to the point where a commercially proven and environmentally sound system is presently available for immediate full-scale installation on Boiler No. 33. Such a device, even if developed for use at the Mitchell Power Station, could not be completed until 1983.

(3) Scientific theory suggests that under certain circumstances the gases emitted from the stack of a coal-fired boiler utilizing a sulfur emission control device may cause deleterious effects in the immediate vicinity of such a boiler, effects which are not experienced when gases are emitted from the stack of a coal-fired boiler without a sulfur emission control device. It is believed that further investigation of this theory is warranted before West Penn is required to install a device which will substantially increase electric rates of West Penn's customers and which may, as in the case of the recently discredited catalytic converter in the automotive field (see Wall Street Journal of March 6, 1975), increase the potential for adverse health effects.

(c) In June of 1972, installation of a sulfur emission control device on Boiler No. 33, if one had been available, would not have unduly strained West Penn's financial position because of relatively modest capital expenditure projections, substantial internal cash generation, a steady growth in sales, a low inflation rate, ample fuel supplies, moderate escalations in coal costs, a strong AA bond rating,

interest rates between 7 and 7½%, ability to obtain equity funds at well above book value,[6] and a favorable regulatory climate (West Penn had not requested or received a general rate increase since the mid-1950's; indeed, the cost of electricity had generally been declining).

At the present time, however, West Penn's ability to finance the installation of a scrubber, now estimated to cost in the neighborhood of $50 million, is doubtful at best, for the following reasons, among others: Projected capital construction costs have risen almost 100%; a lower growth in sales is projected; coal costs have skyrocketed and delays in recovery of those costs, together with rampant inflation, have eroded normal internal cash generation; interest rates remain near 10%; equity funds can only be obtained at below book values; current earnings only marginally support the AA bond rating; and the regulatory climate is characterized by active consumer opposition to increasing electric rates.

West Penn estimates that just to carry out its currently projected construction program for facilities necessary to assure continued adequate and reliable service, i.e., without allowing for installation of a $50 million sulfur emission control device, will require timely rate increases from the Pennsylvania Public Utility Commission in annual amounts far more substantial than those requested in the past, excluding fuel adjustment clause increases. If such

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6. West Penn is a subsidiary of Allegheny Power System, Inc. and West Penn's equity funding must be obtained through its parent company.

relief is not forthcoming, the Company's financing ability will be severely restricted and construction must be cut back.

(d) Recent information developed by the EPA, as well as others, suggests that sulfur dioxide limitations applicable to the Mitchell Power Station and contained in the Pennsylvania implementation plan may be based upon erroneous assumptions concerning the effect of this air contaminant on public health.

(e) Until February 18, 1975, when the Administrator issued to West Penn an order requiring Boiler No. 33 to comply with the sulfur emission standards of the Pennsylvania implementation plan by December 31, 1978 (later extended to March 1, 1979) if West Penn elected to install a desulfurization system, or by March 1, 1976 (later extended to May 1, 1976) if a fuel switch was selected as the method of compliance, West Penn had no formal action by the Administrator upon which to base a challenge to the reasonableness of the Pennsylvania implementation plan and to the Administrator's interpretation of that plan.[7]

(f) The only means presently available to West Penn to comply with the sulfur dioxide standards contained in Pennsylvania's implementation plan is to shut down the Mitchell Power Station. Such a course of action requires approval from the Pennsylvania Public Utility Commission, which may or may not be granted.

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7. See the opinion of the District Court in the action referred to in footnote 1, *supra*.

Based upon the foregoing, it is respectfully submitted that West Penn's challenge to the Administrator's approval of the sulfur oxide emission limitations in the Pennsylvania implementation plan is based solely on grounds arising after June 30, 1972 and that the jurisdiction of this Honorable Court to consider that challenge exists pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §1857h-5(b)(1).

West Penn requests, therefore, that this Honorable Court direct the respondent Administrator to conduct a hearing to receive evidence pertaining to those new grounds and to reconsider the Pennsylvania implementation plan in light of such evidence adduced, and that the Court grant such other relief which is deemed appropriate under the circumstances.

Respectfully submitted,

ROSE, SCHMIDT AND DIXON
By HAROLD R. SCHMIDT
By LAWRENCE A. DEMASE
By EDWIN J. STRASSBURGER

Attorneys for Petitioner

West Penn Power Company
919 Oliver Building
Pittsburgh, Pennsylvania 15222

Dated: March 20, 1975

APPENDIX "E"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WEST PENN POWER COMPANY v. RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania and MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources	Civil Action No. 73-1083

Opinion

KNOX, District Judge

West Penn Power Company, a Pennsylvania public utility, has filed suit in this district court asking for an injunction against defendant Train, Administrator of the Environmental Protection Agency of the United States (hereinafter referred to as the Federal Administrator) and Maurice K. Goddard, individually and as Secretary of the Department of Environmental Resources, and the Department of Environmental Resources of the Commonwealth of Pennsylvania (hereinafter collectively referred to as the State defendants). The suit seeks an injunction against enforcement of a notice of violation issued by the Federal Administrator requiring plaintiff to install a sulphur emission control device on Boiler No. 33 at its Mitchell Power Station, a

"fossil-fired" electric generating facility in Washington County, Pennsylvania and also seeks a declaratory judgment that it is not in violation of the Pennsylvania Plan for control and abatement of air pollution as approved by the Federal Administrator. Particularly, it is complained that the defendants are acting without authority of law in rejecting plaintiff's Plan for compliance with national standards controlling sulphur oxides by the use of a tall stack instead of sulphur emission control devices on the boiler.

Plaintiff avers that there are presently no sulphur emission control devices available for use on this boiler to enable it to comply with the regulations and that if it is required to install such devices, its generating capacity will be greatly reduced and its supply of electric power to its customers will be impaired. It is further averred that to install such devices will result in an expenditure in excess of $23,000,000 and annual costs of $6,500,000 which will require considerable increases in rates to its customers.

The federal legislation is lengthy and complicated with respect to air pollution. The air pollution control provisions are embodied in 42 U.S.C. 1857, *et seq*, with numerous amendments. This legislation provides a comprehensive scheme for the control of air pollution throughout the United States. In 1857(c)(5) (Section 110) provision is made for filing of state implementation plans to conform with national air quality standards as promulgated by the Federal Administrator. A plan is to be adopted by each state and submitted to the Administrator within a limited period of time for approval. Provision is made for action by the Administrator in promulgating a plan where the state does not act.

The complaint is not clear as to exactly when the Pennsylvania plan for implementation of the national ambient air quality standards for Pennsylvania was approved by the federal agency, but it does appear that such approval was prior to September 15, 1972, because in paragraph 9 of the complaint, it is averred that the plaintiff on that date petitioned for a variance from the limitations contained in the Pennsylvania plan which petition for variance was amended June 7, 1973.

The amended complaint (which, *inter alia,* added defendant Goddard as a defendant in addition to the original defendant the Department of Environmental Resources of the Commonwealth of Pennsylvania) avers that on September 13, 1973, the Federal Regional Administrator notified the plaintiff that its power station was in violation of the Pennsylvania Plan. On September 19, 1973, it is averred that the state defendants rejected a variance for use of a tall stack on the boiler in question but postponed compliance until June 30, 1976, when they directed plaintiff to install a sulphur emission control device on the boiler in question which order of the state defendants plaintiff avers has been appealed "to the appropriate administrative body".

The plaintiff avers that the Federal Administrator has exceeded his authority in interpreting the federal Act to prohibit the use of a tall stack as a method for attainment of air quality standards and as a result of this interpretation by the Federal Administrator, the state defendants have failed to promulgate regulations permitting the use of a tall stack as a part of the Pennsylvania plan. It is therefore claimed that the federal defendant has breached his non-discretionary duties under Sections 108 and 110 of the Act (42 U.S.C. 1857c—3 and 5).

The Pennsylvania legislation under which the state defendants and proceeding is found is 35 Purdon's Pa. Stats 4001, *et seq.* It provides as pointed out by the plaintiffs for fines up to $1,000 per day, conviction after further proceedings for a misdemeanor, and civil penalties of $10,000 plus $2,500 for each day. This would appear enough to constitute irreparable harm for a preliminary injunction if the plaintiff was in the proper judicial forum.

A. *Suit Against The Federal Defendants.*

Insofar as the federal defendants are concerned, plaintiff asks relief for a decree declaring that neither defendants have a right to reject plaintiff's plan for compliance, that the decree be entered declaring that plaintiff is not in violation of the Pennsylvania plan as approved by the Administrator and for a preliminary injunction enjoining the Federal Administrator from proceeding to enforce the notice of violation issued on September 13, 1973.[1]

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1. "2. Pursuant to its authority under the Pennsylvania Public Utility Law, 66 P.S. 1101 *et seq,* Plaintiff operates the Mitchell Power Station, a fossil-fired electric generating facility in Washington County, Pennsylvania.

3. Defendant, Russell Train, is the Administrator of the Environmental Protection Agency of the United States of America ("Administrator" herein) charged with the responsibility under the Clean Air Act, 42 U.S.C. 1857 *et seq* of approving or disapproving plans of the States for the implementation of national ambient air quality standards and, in cooperation with the States, of the enforcement of plans approved by the Administrator for the implementation of national ambient air quality standards.

Jurisdiction to bring this suit against the Federal Administrator is allegedly founded upon 5 U.S.C. 701, *et seq.* (Administrative Procedure Act), the Federal Declaratory Judgment Act (28 U.S.C. 2201 and 2202, together with the jurisdictional grant contained in 28 U.S.C. 1337) and also upon portions of the Clean Air Act, specifically 42 U.S.C. 1857h—2.

Footnote 1 continued from page 49a.

4. Defendant, Department of Environmental Resources of the Commonwealth of Pennsylvania ("Department" herein) is an administrative agency of the Commonwealth of Pennsylvania authorized by the Pennsylvania Air Pollution Control Act, 35 P.S. 4000 *et seq.* to prepare and develop a comprehensive plan for the control and abatement of air pollution in the Commonwealth of Pennsylvania.

* * *

6. This Court's jurisdiction is based upon the Clean Air Act, 42 U.S.C. 1857 *et seq,* specifically 42 U.S.C. 1857h-2; the Administrative Procedure Act, 5 U.S.C. 701 *et seq;* The Federal Declaratory Judgment Act, 28 U.S.C. 2201 and 2202 and 28 U.S.C. 1337.

7. The Clean Air Act, 42 U.S.C. 1857 *et seq* is an Act of Congress regulating commerce.

8. On information and belief plaintiff avers that the Administrator of the Environmental Protection Agency has approved the plan submitted to it by defendant Department for the implementation of national ambient air quality standards in the Commonwealth of Pennsylvania. The plan approved by the defendant Administrator included the rules and regulations of the defendant Department with respect to the attainment of national primary ambient air quality standards for particulate matter and sulfur oxides as well as rules and regulations with respect to variances from emission standards for particulate matter and sulfur oxides."

Insofar as the Administrative Procedure Act and Declaratory Judgment Act are concerned, our Circuit has spoken very clearly in *Getty Oil Co. v. Ruckelshaus,* 467 F. 2d 349 (3d Cir. 1972) stating (page 356) "The Declaratory Judgment Act and APA could not afford a basis for jurisdiction."

Referring to 42 U.S.C. 1857h—2 (Section 304 of the Act) it appears that plaintiff's claim for jurisdiction is based upon this language.

> *"Citizen suits — Establishment of right to bring suit*
>
> (a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be."

1857h—2(b) provides as follows:

> "No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Admin-

istrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, . . ."

It appears from the complaint and the admissions of the parties that no such notice was given prior to the institution of this suit. We agree with the defendant that the Congress can specify in legislation terms upon which the government consents to be sued and such terms must be strictly followed. Hence, the court has no jurisdiction of this suit under that Section. Entirely aside from the notice provisions, we hold that this court has no jurisdiction under this Section for the reason that this covers only cases where the Administrator is being sued for failure to perform a non-discretionary duty. Here the plaintiff is attacking the Administrator's action in approving the Pennsylvania plan, and including therein a provision which prevents plaintiff from using the so-called tall stack as a method of compliance with the ambient air standards. A reference to 42 U.S.C. 1857c—5 (Section 110) shows that the Administrator has ample discretion in determining approval of state plans and hence it is the holding of this court that no suit will lie under 1857h—2.

The real obstacle in plaintiff's path, however, is 42 U.S.C. 1857h—5(b) (Section 307) wherein it is provided:

"(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be

prescribed under section 1857f—1(b)(1) of this title), any determination under section 1857f—1(b)(5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.*

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

Admittedly the plaintiff chose not to file an appeal with the Court of Appeals for the Third Circuit, which appears to be the appropriate court, within 30 days and comes in now at this late date (suit was filed December 20, 1973) well over a year later in an attempt to secure injunctions and declaratory judgments in this district court against the actions of the Administrator.

Again our Circuit in *Getty Oil, supra,* has spoken very clearly on this matter:

". . . Getty was in the wrong court by virtue of section 307 of the Act. *The Declaratory Judgment Act and APA could not afford a basis for jurisdiction.* Getty's arguments against enforcement require

a determination by the court whether the regulation is unnecessary, unreasonable or capricious. Whether Getty abides in the regulation 'in its general application' is immaterial. *If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing for a forum for judicial review. UMC Industries, Inc. v. Seaborg,* 439 F. 2d 953 (9th Cir. 1971). The Declaratory Judgment Act and the APA do not extend jurisdiction of either the district courts or the appellate courts to cases not otherwise within their competence."

The court further said:

"No appeal was taken from the Administrator's approval of the implementation plan to the court of appeals as provided by the Clean Air Act. Instead, Getty chose to seek a restraining order in the Chancery Court of Delaware in December of 1971."

Getty thereafter brought a suit in the United States District Court for the District of Delaware and the Court of Appeals held that the plaintiff company was attempting an end run around the act by seeking pre-enforcement judicial review. The court held that there was no jurisdiction in the district court and remanded the case with directions to the district court to enter an order of dismissal for lack of jurisdiction. The court further said:

> "The Administrator has a responsibility to see that a state plan will meet the national standards. Because of that responsibility, he has a vital interest in determining whether a particular deferral will have the effect of preventing attainment or

> maintenance of the national standard. However, until the criteria of 40 CFR 51.32(a) through (f) are met, the Administrator is duty bound to enforce an approved implementation plan.
>
> "Getty's protestations of good faith attempts to bind suitable technology which would enable it to comply do not affect the Administrator's duty of enforcement. Likewise, the conditions established for postponement of compliance with 42 U.S.C. 1857c—5(f)(1) are not available to Getty in any event."

We agree that the granting of the variance by the state authorities extending time for compliance to June 30, 1976, amounts to a modification of the Pennsylvania plan and in such case to stay the hand of the federal government there must be an application by the governor of Pennsylvania under 42 U.S.C. 1857c—5 and 6.

We have further enlightenment on the problems before use in the case of *Duquesne Light Co. v. Environmental Protection Agency,* 481 F. 2d 1 (3d Cir. 1973). In that case, involving clarification of a previously entered remand order by the circuit on petition for review timely filed, the court said:

> "Review by federal courts of actions taken by the Administrator is circumscribed by section 307(b)(1). It provides that petitions for review of the Administrator's actions approving implementation plans are to be filed in the United States Court of Appeals for the appropriate Circuit, within thirty days of the date of the Administrator's approval. Subsection (2) of 307(b) forecloses later litigation in enforcement proceedings of issues for

which review could have been had under section 307(b)(1)."

The court further pointed up the so-called "Getty Oil dilemma" which also exists in the instant case, namely that even though a variance has been obtained from state authorities, the Federal Administrator is nevertheless bound to enforce the original plan at least until proper application is made by the governor as hereinbefore mentioned. The court said:

"A. *The Getty Oil Dilemma*

At oral argument, the EPA asserted that redress through the state administrative process was the proper course for Duquesne and St. Joe to pursue. The companies applied for variances permitting deviation from the plan's requirements. Petitions seeking variances have, according to counsel, been filed with the appropriate state authority and are wending their way through the state administrative process. Presumably, the final state administrative determination will be subject to judicial review, pursuant to the Pennsylvania Administrative Agency Law, 71 P.S. 1710.41. Such recourse to the state procedure for correction of alleged imperfections in the Pennsylvania Implementation Plan is the path advocated by the EPA, but an undoubtedly time-consuming course of action. However, it does appear to serve the bi-level design of section 110 of the Clean Air Act."

The court further said:

"Thus Getty found itself in a difficult position. It was liable to federal sanctions, imposed because Getty was violating a state regulation adopted by the Federal Government, but in effect, repudiated by the state. The present case presents the Court with the specter of a recurrence of the Getty paradox. Here the plan has been adopted by, and is enforceable by, the EPA during the time state proceedings that might alter the plan are underway. A proper decision of this case requires a resolution of this predicament. However, such resolution will be considered in the concluding section of this opinion."

The court concluded as follows:

"The Court finds that to expose the companies to the risk of punishment without affording them full occasion to express their objections to the state implementation plan is fundamentally unfair. Therefore, this court instructs the EPA that it must either (a) refrain from imposing any penalties on these companies during the pendency of their state administrative and judicial actions, so long as such actions are pursued by the companies in good faith and with due diligence or (b) afford the companies a limited legislative hearing."

As noted, it appears the plaintiff finds itself in the "Getty Oil Dilemma". But if so this is to a considerable extent its own doing in not filing a petition for review with the circuit at the proper time. The circuit having a case properly before it could very well direct the administrator to refrain from enforcement procedures while the variance application was still pending before the state authorities but this court certainly would have no power to enter such a direction to the administrator when we determine as we do that we have no jurisdiction of this case at all. For this reason, the motions to

dismiss filed by the Federal Administrator must be granted.

B. *The State Defendants.*

Turning to the state defendants, we likewise find that we are without jurisdiction in this matter. The state defendants have raised numerous questions with respect to the jurisdiction of this court over the Department of Environmental Resources of the Commonwealth of Pennsylvania and likewise over Maurice K. Goddard who was sued individually and as secretary of this department to eliminate the argument that the suit was actually against the State of Pennsylvania and hence in violation of the Eleventh Amendment. The suit as stated was originally brought only against the State Department and the state defendants very properly raised the question that the suit could not stand under the Eleventh Amendment. This was so held by the United States Supreme Court in *Employees of the Department of Public Health and Welfare State of Missouri v. Department of Public Health and Welfare of Missouri,* 411 U.S. 279, 36 L ed 2d 251, 93 S Ct 1614 (1973). It will be noted, however, that *Employees* involved payment of money out of the public treasury of the State of Missouri. The instant case involves no such payment. Instead this suit for declaratory and injunctive relief only would appear to be properly brought against Goddard as an individual and as Secretary under the exposition of principles contained in *Edelman v. Jordan,* —— US ——, 39 L ed 2d 662 (United States Supreme Court Slip Opinion 72-1410, March 25, 1974) in which case it was held that a suit such as this would lie under the decision in *Ex parte Young,* 209 U.S. 123, 52 L ed 714, 28 S Ct 441 (1908) even though there might

be some effect upon the state revenues since the state officials were enjoined from enforcing monetary penalties against the offending party.

However this may be, we hold that we have no jurisdiction to order relief against the state officials by compelling them to promulgate variances as sought by the plaintiff herein and in refraining from enforcing the Pennsylvania plan which it is asserted was approved without proper authority by the Federal Administrator. Such determinations can only be made on a petition for review by our court of appeals and since such review was not sought at the appropriate time, the only other remedy is to secure a complete variance and resulting modification of the plan through state proceedings and application by the governor under 42 U.S.C. 1857c—5 and 6 as heretofore discussed.

It does appear that a variance was sought from the state authorities and the plaintiff states its position as follows:

> "On September 19, 1973, the Department granted plaintiff a variance from its sulfur emission standards until June 30, 1976, rejecting however plaintiff's proposal for the use of a tall stack on Boiler No. 33 and directing it to install a sulfur emission control device. The action in the Department was appealed to the environmental hearing board—
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> "Despite the Department's grant of a variance until June 30, 1976, the Governor of Pennsylvania to date has not made application under Section 110f—1 of the Clean Air Act, 42 U.S.C. 1857c—5(f) for a one-year extension of the mid-1975 compliance dates of the Pennsylvania Implementation Plan. Nor to plaintiff's knowledge has any revision of

that plan been submitted for approval of the Administrator under section 110a—3 of the Clean Air Act, 42 U.S.C. 1857c—5(a)(3)."

Again, we are dealing with discretionary powers of state officials. Any state policy relying upon dispersion techniques rather than the emission limitations has been held to violate the Congressional policy with respect to clean air. See *Natural Resources Defense Counsel, Inc. v. Environmental Protection Agency,* 489 F. 2d 390 (5th Cir. 1974) in which case it was pointed out (page 401):

"Section 1857c—5(f) is the device Congress chose to insure this. Congress aimed to make variances, postponements or whatever departures from earlier commitments might be called unusual and difficult to obtain. That is why Congress required applications for them to be made by the Governors of the states thus insuring an initial screening of applications by high level state officials. And that is why Congress imposed rigorous substitute conditions on the granting of variances allowing them only when the unavailability of technology made compliance impossible when continued operation of the source was essential to national security, public health or public welfare and when all available alternative control measures had been taken."

The administrative authorities both state and federal should take into consideration these matters in connection with the current national energy crisis which may indicate wider use of certain types of coal fuels resulting in larger sulfur oxide emissions than heretofore considered proper with, of course, all possible devices to prevent further deterioration of the environment. That,

however, is not a matter for this court but for the administrative agencies charged with enforcement of these statutes and also for Congress to consider.

It would obviously be futile for this court to restrain the state authorities from enforcing these statutes in compliance with a plan which Pennsylvania has submitted and had approved by the federal authorities, and this court certainly has no means of requiring the Governor of Pennsylvania to submit an application for amendment of the plan as heretofore approved since, as pointed out by the Fifth Circuit, it was intended that such variations be difficult and be entirely reposed in the governor's discretion as to whether action was proper under circumstances existing.

It appears that plaintiff's complaint is not that state agencies have not granted them a postponement. Rather, they complain that the state agency should have granted them a complete variance and permitted a tall stack to be erected in lieu of emission control devices which would amount to a wholesale amendment of the Pennsylvania plan.

If the plaintiff has any complaints about stays of proceedings or has any other remedies against the Pennsylvania authorities, it appears that it has ample means of securing extensions and so forth if the same are proper under 35 P.S. 4004 (subsection 4.1) wherein it is provided:

"An appeal to the hearing board of the department's order shall not act as a supersedeas: provided however that upon application and for cause shown the hearing board of the Commonwealth court may issue such supersedeas. Any person aggrieved by an adjudication of the hearing board may appeal to the Commonwealth court."

This court has no disposition to interfere with the administrative procedures under Pennsylvania law which appear to be comprehensive and capable of handling any complaints, constitutional or otherwise, which may be made by the plaintiffs. Particularly is this so when it appears we have no jurisdiction as heretofore determined over the Federal Administrator, and any such orders against the state authorities would be exercises in futility.

For the above reasons, we determined that this court has no jurisdiction of this suit and an appropriate order will be entered.

ORDER

AND NOW, to wit, June 19, 1974, for reasons set forth in the foregoing opinion and after consideration of the briefs and arguments of counsel and the court being of the opinion that it has no jurisdiction in the premises,

IT IS ORDERED that this action and the complaint filed herein be dismissed for lack of jurisdiction.

WILLIAM W. KNOX
United States District Judge

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APPENDIX "F"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WEST PENN POWER COMPANY v. RUSSELL TRAIN, et al	Civil Action No. 73-1083

Memorandum and Order Denying Motion for Reconsideration of Order of June 19, 1974

The plaintiff West Penn Power Company has filed a motion for reconsideration of the court's order of June 19, 1974, dismissing plaintiff's complaint for lack of jurisdiction. The complaint was dismissed as to all defendants. However, the motion for reconsideration apparenty only applies to the defendant Train as Administrator of the Environmental Protection Agency.

The court has reviewed the motion and the briefs of the parties and has concluded that nothing new has been presented which was not previously considered by the court in entering its order of June 19, 1974.

In the opinion of the court this case is controlled by *Getty Oil Company v. Ruckleshaus,* 467 F. 2d 349 (3d Cir. 1972) and it would be reprehensible for this court to attempt to deviate from the holding of the circuit in that case. The fact that in this case plaintiff has received from the state authorities a variance until July 1, 1976 which is apparently unsatisfactory to it and which it is contesting does not appear to mandate a result dif-

ferent from that in *Getty* where a state court order had restrained the state authorities from enforcement.

The court further agrees with the defendant that in *Duquesne Light Company v. Environmental Protection Agency,* 481 F. 2d 1 (3d Cir. 1973) the court of appeals clearly held that the Pennsylvania Plan remained in effect except as to those power companies who filed petitions for review timely under Section 307(b)(1) of the Federal Act. It is true that in *Duquesne Light* the circuit issued instructions to the Environmental Protection Agency with respect to those power companies who were seeking a variance under the Pennsylvania Plan but as previously stated if any such instructions are to be issued the same would have to come from the circuit and not from this court which has held it has no jurisdiction of the proceedings.

Order

AND NOW, to wit, August 13, 1974, upon consideration of the briefs of the parties and for reasons set forth in the foregoing memoranda,

IT IS ORDERED that the motion of West Penn Power Company for reconsideration of the court's order of June 19, 1974, be and the same hereby is denied.

WILLIAM W. KNOX
United States District Judge

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APPENDIX "G"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2050

WEST PENN POWER COMPANY,
a corporation, Appellant

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania and MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania

(D. C. Civil No. 73-1083)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 28, 1975

Before VAN DUSEN, ADAMS and GARTH,
Circuit Judges

HAROLD R. SCHMIDT, Esq., LAWRENCE A. DEMASE, Esq. and EDWIN J. STRASSBURGER, Esq., ROSE, SCHMIDT AND DIXON, Pittsburgh, Pa.
and
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Attorneys for Appellee RUSSELL TRAIN

BARBARA H. BRANDON, Assistant Attorney General, Commonwealth of Pennsylvania, Harrisburg, Pa.

Attorney for Appellee Maurice K. Goddard and Appellee Department of Environmental Resources of the Commonwealth of Pennsylvania

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Opinion of the Court

(Filed July 16, 1975)

VAN DUSEN, *Circuit Judge.*

This appeal challenges a June 19, 1974, district court order dismissing West Penn Power Company's amended complaint for lack of jurisdiction.[1] The dismissed complaint sought injunctive and declaratory relief protecting West Penn from any duty to comply with the particulate and sulfur compound emission standards established as part of Pennsylvania's implementation plan[2] pursuant to the Clear Air Act, 42 U. S. C. §1857 *et seq.*[3]

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1. The district court opinion and order of June 19, 1974, are docketed as Document #24 in Civil No. 73-1083 (W. D. Pa.). The memorandum and order of August 13, 1974, denying the motion for reconsideration of the June 19 order was docketed as Document #29 in Civil No. 73-1083 (W. D. Pa.).

2. 25 Pa. Code Ch. 123 contains the particulate matter and sulfur compound emission standards relevant to this action. 25 Pa. Code Chs. 121-141 comprise the regulations which form Pennsylvania's implementation plan. The plan was adopted by the Environmental Quality Board of the Commonwealth of Pennsylvania on January 27, 1972, and approved by the Administrator of the Environmental Protection Agency (EPA) on May 31, 1972. 37 Fed. Reg. 10889; 42 U. S. C. §1857h-5(a) (1) and (2).

3. The Clean Air Act was amended by the Air Quality Act of 1967, 81 Stat. 485, and the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676. The 1970 amendments to the Clean Air Act required the EPA to propose primary and secondary air quality standards. 42 U. S. C. §1857c-4. Within nine months after the promulgation of each of these standards, every state was to adopt and submit to the Administrator of

West Penn did not file a petition for review under 42 U. S. C. § 1857h-5(b) (1)[4] to challenge the implementation plan when it was approved, but petitioned the Pennsylvania Department of Environmental Resources (DER) for a variance[5] from the particulate, visible, and sulfur compound emission standards applicable to Boiler No. 33 of West Penn's Mitchell Power Station. On

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the EPA "a plan which provides for implementation, maintenance, and enforcement" of the standards. 42 U. S. C. §1857c-5. In accordance with the statutory scheme, Pennsylvania held four public hearings on its proposed plan. The record does not reveal whether West Penn appeared at any of the hearings, which were held from December 1-4, 1971. The plan, including the emission standard which generated this suit, was adopted by the Pennsylvania Environmental Quality Board on January 27, 1972; the plan provisions relevant to this suit were approved by the EPA Administrator on May 31, 1972. 37 Fed. Reg. 10889. For a fuller description of the legislative scheme, see *Duquesne Light Co. v. EPA*, 481 F. 2d 1, 3-5 (3d Cir. 1973).

4. 42 U. S. C. § 1857h-5(b) (1) provides in pertinent party:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."

In addition to challenging the plan as a whole under the above statute, West Penn could have sought relief from the operation of particular requirements of the plan by seeking a variance pursuant to 35 Purdon's Pa. Stats. § 4004.41 and 42 U. S. C. § 1857c-5(a) (4).

5. See generally 25 Pa. Code Ch. 141. Chapter 141 was adopted January 27, 1972 and approved by EPA on May 31, 1972.

September 13, 1973, before DER had acted on its variance request,[6] West Penn received from EPA a Notice of Violation[7] charging that the Mitchell Power Station was in violation of the applicable particulate and sulfur compound emission standards. Thereafter, on September 19, 1973, DER granted West Penn a temporary variance until June 30, 1976, from the sulfur emission standards.[8] The variance, however, rejected West Penn's proposal that it use a "tall stack" and low sulfur coal to meet the standards;[9] installation of a "scrubber"

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6. The petition for variance, originally filed September 15, 1972, was amended on June 7, 1973. In its amended petition, West Penn proposed to reduce sulfur compound emissions by burning low sulfur coal and by building a "tall stack" to reduce ground-level concentration of the pollutant. West Penn further stated its intent to "install sulfur-control equipment as soon as commercially proven, reliable, and environmentally acceptable equipment is available." Particulate matter was to be controlled by use of an electrostatic precipitator and by chemical treatment of the flue gas.

7. The notice of violation was issued pursuant to 42 U. S. C. § 1857c-8(a)(1), which provides:

> "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section."

8. Particulate emission standards were to be met by November 1, 1973.

9. See note 6 *supra*.

device for controlling sulfur compound emissions was a condition of the variance. This temporary variance has not been approved by EPA.[10]

West Penn first appealed DER's variance order to the Pennsylvania Environmental Hearing Board[11] and then, on December 20, 1973, filed this action against the Administrator of EPA, Train, the Secretary of DER, Goddard, and DER.[12] The complaint, as amended,[13] asked for a declaratory judgment both that the tall stack scheme for effecting compliance with Pennsylvania's implementation plan could not be rejected by the defendants and that West Penn was no presently violating the plan. West Penn also sought preliminary and permanent injunctions against EPA enforcement of the September 13, 1973, Notice of Violation and DER en-

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10. See 42 U. S. C. § 1857c-5(a)(3); *Train v. Natural Resources Defense Council, Inc.*, 43 U. S. L. W. 4467, 4476-77 (U. S., April. 16, 1975); *Getty Oil Co. v. Ruckelshaus*, 467 F. 2d 349, 358 (3d Cir. 1972), *cert. denied*, 409 U. S. 1125 (1973).

11. See 35 Purdon's Pa. Stats. §§ 4004(4.1), 4013.5, and 71 Purdon's Pa. Stats. § 1710.41. The action is docketed at Environmental Hearing Board No. 73-330.

12. Before filing suit in federal court, West Penn participated in a series of meetings held by EPA from October 18 to November 2, 1973. Among the tops under investigation at this conference was the state of the art of sulfur emission control.

13. The original complaint named only EPA and DER as defendants. After a March 7, 1974, hearing on the motions to dismiss filed by EPA and DER in January 1974, West Penn amended its complaint to add the Secretary of DER as a defendant.

forcement of the order to install a "scrubber."[14] Jurisdiction was predicated upon "the Clean Air Act, 42 U. S. C. § 1857 *et seq.*, specifically 42 U. S. C. § 1857h-2 [entitled "Citizen suits—Establishment of right to bring suit"];[15] The Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*;[16] The Federal Declaratory Judgment Act, 28 U. S. C. §§ 2201 and 2202; and 28 U. S. C. § 1337."[17] Amended Complaint, ¶ 6, Civil Action No. 73-1083, Document #20 (W. D. Pa.).

On June 19, 1974, after the three defendants had filed F. R. Civ. P. 12(b) motions to dismiss for lack of subject matter jurisdiction,[18] the district court dismissed the amended complaint in its entirety, as to all defendants. The court first determined that it lacked jurisdiction over the EPA Administrator, Train. Relying on *Getty Oil Co. v. Ruckelshaus*, 467 F. 2d 349 (3d Cir. 1972), *cert. denied*, 409 U. S. 1125 (1973), the district court concluded that neither the Declaratory Judgment Act (DJA) nor the Administrative Procedure Act (APA) furnished a jurisdictional base for West Penn's suit against Train.[19] No jurisdiction lay under § 1857h-2 because West Penn had not given Train 60 days' notice

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14. In its brief, West Penn avers that the complaint also asked for "a decree that the installation of flue gas desulfurization device ["scrubber"] on Boiler No. 33 would not effect compliance with the Pennsylvania implementation plan after the expiration of the variance period." Brief for Plaintiff-Appellant at 5. We agree with defendant Secretary of DER that the complaint cannot be construed as raising such an issue.

15. "§ 1857h-2. Citizen suits—Establishment of right to bring suit.

> "(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—
>
> * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.
>
> Notice
>
> "(b) No action may be commenced —
>
> * * *
>
> (2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator."

16. See Part II, *infra*. Neither the APA nor 42 U. S. C. § 1337, see note 17, *infra*, was alleged as a jurisdictional basis in the original complaint.

17. "§ 1337. Commerce and anti-trust regulations

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The complaint relied on the Clean Air Act, 42 U. S. C. § 1857, *et seq.*, as an act of Congress regulating commerce within the scope of § 1337.

18. DER and Goddard also argued that the Eleventh Amendment precluded the court from exercising personal jurisdiction over them. Other grounds for dismissal urged by DER and Goddard were: failure to join indispensable parties; no exhaustion of administrative remedies; failure to state a claim upon which relief could be granted; and the abstention doctrine.

19. The court considered and rejected the allegation of jurisdiction under 28 U. S. C. §1337 together with the APA and DJA claims.

of the suit, as required by that section.[20] Having thus rejected each of West Penn's jurisdictional claims,[21] the district court went on to find that, in any event, 42 U. S. C. § 1857h-5(b)(1) and (2)[22] foreclosed district court jurisdiction over the action. Since the district court determined that all issues raised in the complaint could have been brought before the court of appeals in

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20. The district court opinion set forth the notice provisions applicable to subsection (a)(1), rather than (a)(2). See note 15 *supra*. However, 60 days' notice is required in either case, so that the mis-citation was immaterial.

As a second reason for rejecting § 1857h-2 jurisdiction, the district court relied on the discretionary nature of the Administrator's action "in approving the Pennsylvania plan, and including therein a provision which prevents plaintiff from using the so-called tall stack as a method of compliance with the ambient air standards." § 1857h-2 applies only to cases where the Administrator fails to perform a non-discretionary Act. To the extent that *Train v. Natural Resources Defense Council,* 43 U. S. L. W. 4467 (U. S., Apr. 16, 1975), suggests the Administrator's discretion is more limited than the district court inferred from its reading of 42 U. S. C. § 1857c-5, this second ground might not, alone, be dispositive of the claim under § 1857h-2. The failure to give notice, however, sufficies to preclude § 1857h-2 jurisdiction. Moreover, West Penn has not appealed this jurisdictional holding. But see *Metropolitan Washington Coalition for Clean Air v. District of Columbia,* 373 F. Supp. 1089, 1092 (D. D. C. 1974).

21. See note 19 *supra*.

22. See note 4 *supra*. 42 U. S. C. § 1857h-5(b)(2) provides:

> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

an action challenging the Pennsylvania implementation plan, it held that West Penn's exclusive recourse against Train was a proceeding under 42 U. S. C. § 1857h-5(b)(1).

As to DER, the court held the action barred by the Eleventh Amendment.[23] The court also concluded that it lacked jurisdiction over the Secretary of DER, Goddard. The court viewed West Penn's assertion that DER lacked power to reject a "tall stack" or to direct installation of a "scrubber" as, essentially, a challenge to the Pennsylvania implementation plan. Such a challenge could be brought only in the court of appeals pursuant to 42 U. S. C. § 1857h-5(b)(1) and (2). The district court opinion recognized that a variance from the air quality standards would remedy West Penn's complaint, but noted that the temporary variance issued by DER on September 19, 1973, was ineffective without EPA approval, which the court could not compel.[24] This lack of

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23. This holding was not appealed.

24. See discussion at 6-7, *supra*. The district court relied on *Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 489 F. 2d 390 (5th Cir. 1974), in stating that a valid variance could only be obtained upon application of the Governor of Pennsylvania for a one-year extension of the compliance date for the implementation plan. This elaborate procedure for obtaining a postponement of the compliance date is contained in 42 U. S. C. § 1857c-5(f). Since the district court authored its opinion, the Supreme Court has reversed the Fifth Circuit decision, *supra,* and held, in *Train v. NRDC,* 43 U. S. L. W. 4467, 4471 (U. S., Apr. 16, 1975), that a variance can be obtained pursuant to § 1857c-5(a)(3), rather than § 1857c-5(f). Under § 1857c-5(a)(3), a variance becomes effective merely upon approval by the EPA Administrator. Further, the Administrator is to grant the variance "if he determines

jurisdiction over the EPA Administrator, Train, rendered federal court intervention "futile," since Goddard could not grant a variance or approve a "tall stack" without EPA concurrence. Finally, the court found that Pennsylvania law (35 Purdon's Pa. Stats. § 4004(4.1)) offered West Penn ample relief, without any need for federal intervention.

West Penn filed a timely motion for reconsideration challenging the dismissal of the complaint only as to Train and Goddard. On September 10, 1974, after the district court denied the motion, West Penn lodged this appeal. Although it is not clear precisely which aspects of the district court's decision West Penn is appealing,[25]

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that it meets the requirements of [§ 1857c-5(a)(2), which sets forth criteria for an acceptable implementation plan] and has been adopted by the State after reasonable notice and public hearings." The Supreme Court's holding in *NRDC,* however, does not invalidate the district court's finding that West Penn had not obtained an effective variance, since the EPA had not approved the temporary variance under § 1857c-5(a)(3). See 43 U. S. L. W. at 4476-78 and n. 28. Nor, we believe, does the district court's reliance on the Fifth Circuit decision in *NRDC* undercut its conclusion that it lacked authority to compel the grant of a variance to West Penn. A mandamus action, though not proper under § 1857c-5(f) because of the great discretion which the district court identified as implicit in that section, might be proper under § 1857c-5(a)(3). However, no factual or legal argument made by West Penn in this action would support issuance of a mandamus. Therefore, West Penn was not prejudiced by the district court's view that issuance and approval of a variance was discretionary.

25. For example, the complaint seeks declaratory and injunctive relief as to two issues: (1) whether West Penn is presently in violation of the plan's emission standards, and (2) whether a tall stack would comply with the plan. See note 14, *supra.* In arguing that the

we will treat the appeal as raising the following three questions:

> (1) whether the district court properly concluded that § 1857h-5(b)(1) and (2) required dismissal of the complaint as to both Train and Goddard;
>
> (2) whether the district court has jurisdiction under the APA[26] of matters raised in the complaint; and

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district court erred in holding that § 1857h-5(b)(2) required dismissal of the complaint, West Penn urges only that the first issue could not have been raised in a subsection (b)(1) proceeding. Brief for Plaintiff-Appellant at 13-17. It thus appears to concede that the district court properly dismissed the complaint as to the second issue. Such a concession would also amount to an admission that Goddard was properly dismissed as a defendant, since the only cause of action the complaint alleged against Goddard was that he lacked authority to reject a tall stack and order installation of a scrubber as a means of achieving compliance with the plan. Similarly, West Penn's argument that the district court has jurisdiction under the APA postulates power to decide only the first issue raised in the complaint. Brief for Plaintiff-Appellant at 18-23. At the same time, however, the summary of the argument describes the brief as arguing "at length" that subsection (b)(2) did not bar "jurisdiction to consider West Penn's claims against the remaining defendants." Brief for Plaintiff-Appellant at 10, n. 3. It is true that arguments in support of inconsistent alternative claims are permitted under the Federal Rules of Civil Procedure. In this case, however, the arguments are not alternative, but serial, and the inconsistencies in the arguments briefed merely produce unnecessary confusion into a case not otherwise complex.

26. West Penn does not argue on this appeal that jurisdiction lies under § 1337. *But see Dunlop v. Bachowski,* 43 U. S. L. W. 4669, 4671 (June 2, 1975). It also con-

(3) whether due process requires the district court to assume jurisdiction and decide the issues raised in the complaint.

I. *Exclusivity of the review provided in 42 U. S. C. § 1857h-5(b)(1) and (2)*

West Penn claims that EPA could not cite the utility for violating Pennsylvania's implementation plan since West Penn, by filing a petition for a variance on September 15, 1972, received an automatic stay of prosecution for violation of the particulate and sulfur compound emission standards. This argument relies on 25 Pa. Code § 141.5, which provides:

> "(a) A petition which complies with the requirements of § 141.11 of this Title (relating to filing), and which is received by the Department within six months of the effective date of this Chapter, shall operate prospectively as an automatic stay of prosecution for violations of those provisions of this Article with respect to which the variance is sought, until one year after the effective date of this Chapter or until the Department takes action on such petition, whichever occurs first, except that the filing of a petition for a variance, or the grant thereof, shall not relieve the petitioner from full compliance with any orders and permits previously issued or any stipulations and agreements previously entered into by the Department, nor shall such filing in any way preclude the Department from pursuing any and all remedies available to it, at law or in equity, to enforce such orders, permits, stipulations, or agreements."

cedes that the DJA is not jurisdictional in nature, but "defines the form of relief available to an aggrieved party under the Administrative Procedure Act." Brief for Plaintiff-Appellant at 11, n. 4.

West Penn avers that this stay was in effect on September 13, 1973, "and will remain so at least through June 30, 1975."[27] Brief for Plaintiff-Appellant at p. 10, n. 3.

In addition, West Penn argued, both in its brief at 9 and before this court, that it has a variance from DER, granted September 19, 1973, which exempts it from complying with the sulfur emission standards until June 30, 1976.[28] This contention that West Penn is not in violation of the plan thus poses no challenge to "the Administrator's action in approving or promulgating any implementation plan," 42 U. S. C. §1857h-5 (b)(1); rather, it relies on the validity of the plan provisions for granting variances. We therefore agree

27. West Penn does not reveal how it arrived at the June 30, 1975, date. Even if the stay operated for a year after the filing of the petition, rather than a year from the effective date of 25 Pa. Code Ch. 141, the stay would expire no later than June 7, 1974. Since, however, the effective date of Chapter 141 would be May 31, 1972 —the date on which the plan was approved by EPA—the stay would have expired May 31, 1973. This case does not, therefore, raise any conflict between the state plan and the federal Administrator's action. *Train v. NRDC,* 43 U. S. L. W. 4467 (U. S., Apr. 16, 1975), does not have the relevancy assigned it by West Penn's counsel at oral argument.

28. We note that this argument is not legally sustainable. A variance is not effective until it is approved by the EPA Administrator. 42 U. S. C. § 1857c-5(a)(3). Such approval is lacking in this case. See note 10, *supra.* Moreover, even if the argument were valid, West Penn would be subject to citation for violating the particulate emission standards at any time after November 1, 1973. See note 8.

with West Penn that this particular contention could not have been raised in a § 1857h-5(b)(1) proceeding. It follows that the district court erred in finding that subsection (b)(2) barred its jurisdiction to decide this claim.

It also appears that subsection (b)(2) would not foreclose the district court from deciding whether a tall stack was a proper method of complying with the plan. The plan prescribes certain air quality standards which must be met, not specific methods of attaining those standards. A subsection (b)(1) suit would challenge only the plan—that is, the standards, and not the methods of compliance. Thus, subsection (b)(2) would not prevent West Penn from raising the tall stack issue in the district court.[29] See, generally, *Note: Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard,* 1974 Duke L. J. 382, 384; L. Jaffe, *Judicial Control of Administrative Action*, 353-63, 372-76 (1965). However, unless there was an affirmative grant of jurisdiction in the district court, the dismissal for lack of jurisdiction was till proper.

II. *Jurisdiction under the Administrative Procedure Act and the Declaratory Judgment Act*

The district court relied on this court's decision in *Getty Oil Co. v. Ruckelshaus,* 467 F. 2d 349 (3d Cir. 1972), *cert. denied,* 409 U. S. 1125 (1973), for the proposition that neither the DJA, 28 U. S. C. §§2201 and 2202, nor the APA, 5 U. S. C. §§701 *et seq.*, could "afford

29. This case is thus different from *Getty Oil Co. v. Ruckelshaus,* 467 F. 2d 349 (3d Cir. 1972), *cert. denied,* 409 U. S. 1125 (1973), where the plaintiff challenged the Delaware plan regulations themselves. *Id.* at 355. See Part II, *infra.*

a basis for jurisdiction." 467 F. 2d at 356. See also *PBW Stock Exchange, Inc. v. SEC,* 485 F. 2d 718 (3d Cir. 1973); *Zimmerman v. United States,* 422 F. 2d 326 (3d Cir.), *cert. denied,* 399 U. S. 911 (1970). The plaintiff in *Getty* had filed suit in the Delaware district court, attacking certain regulations which had been approved by the EPA Administrator as part of that state's implementation plan under the Clean Air Act. The district court determined that jurisdiction was properly invoked under 28 U. S. C. § 1337, the DJA, and the APA. On appeal, this court rejected the jurisdictional claim, finding that neither the DJA nor the APA extended federal court jurisdiction "to cases not otherwise within their competence." 467 F. 2d at 356.

West Penn asserts that the district court's holding and, presumably, *Getty* are inconsistent with the Supreme Court's opinion in *Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967). *Abbott Laboratories,* appellant contends, clearly mandates district court jurisdiction under the APA to review the administrative action contested by West Penn's complaint. The above cited cases (for example, *Zimmerman, supra*) show that the APA does not constitute a jurisdictional grant[30]

30. *Getty* took *Abbott Laboratories* into account in deciding that the APA did not empower the district court to hear Getty's complaint. Since West Penn does not appear to have advanced any arguments that would not have been considered by the *Getty* court, we would, under normal principles of *stare decisis,* be reluctant to disregard a decision of our court which is closely analogous to the case before us. This reluctance is reinforced by the Supreme Court's favorable citation of *Getty* in *Train v. NRDC,* 43 U. S. L. W. 4467, 4476-77 (U. S., Apr. 16, 1975). We recognize, however, that some commentators have taken a more expansive view of the review-

and hence we must affirm the district court's dismissal in this case. However, assuming, *arguendo,* that it did constitute such a jurisdictional grant, we would still be required to affirm such dismissal.

The APA provides, in certain instances, for judicial review of agency action. 5 U. S. C. §701(b)(1) defines "agency" as "each authority of the Government of the United States . . ." The APA does not extend to state agencies. Thus, it could not afford the district court jurisdiction of West Penn's suit against Goddard, who is the Secretary of a Pennsylvania agency.

As to Train, the complaint set forth two requests for relief. First, it asked that the court render a declaratory judgment that West Penn was not violating the plan as a means of preventing Train from citing the utility for acting contrary to the plan. Second, it asked an injunction against enforcement of any notice of violation. According to 42 U. S. C. §1857c-8(a)(1), the "Administrator shall notify" any "person in violation of the plan. . . ." Issuance of a violation notice is thus nondiscretionary. However, the decision to enforce a violation notice is discretionary under 42 U. S. C. §1857c-8(b).[31] The APA does not provide for review of any

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ability of administrative action under the APA than this court did in *Getty.* See, *e.g.,* G. Vining, *Direct Review and the Doctrine of Ripeness in Administrative Law,* 69 Mich. L. Rev. 1443 (1971); L. Jaffe, *supra,* at 339-63, 372-76.

31. "(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

> "(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; . . ."

act "committed to agency discretion by law." 5 U. S. C. §701(a)(2). See *Commonwealth of Ky. ex rel. Hancock v. Ruckelshaus,* 497 F. 2d 1172, 1177 (6th Cir. 1974). Thus the APA would not provide jurisdiction for the district court to issue the requested injunction. Jurisdiction to issue the requested declaratory judgment is similarly wanted under 5 U. S. C. §704, which subjects to judicial review only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . ." West Penn cites, and we have found, no statute which makes reviewable Train's issuance of a notice of violation. Under the statutory plan, the notice of violation is not "final agency action" since it may be followed by either (1) an order which "may" be issued 30 days after the notice, 42 U. S. C. §1857c-8(a)(1), but "shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation," 42 U. S. C. §1857c-8(a)(4), or (2) a civil suit under 42 U. S. C. §1857c-8(b), referred to above. The statutory scheme contemplates that the violation notice itself has neither an independent coercive effect nor "the force of law." *Columbia Broadcasting System v. United States,* 316 U. S. 407, 418 (1942). The notice bears no resemblance to the Food and Drug Administration regulations which were found reviewable in *Abbott Laboratories* and *Gardner v. Toilet Goods Association,* 387 U. S. 167 (1967). The Court characterized the regulations challenged in *Abbott* and *Toilet Goods* as "formal," "definitive," "effective upon publication" and "self-executing." 387 U. S. at 151, 171. See also *Toilet Goods Association v. Gardner,* 387 U. S. 158, 162 (1967). By contrast, the only effect of a notice of violation is to make the recipient aware that the "defini-

tive" regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures. Of course, the plan's emission standards themselves *are* analogous to the regulations reviewed in *Abbott Laboratories,* but those regulations are not challenged on this appeal. See Part I above.

For the foregoing reasons, we hold that the APA provides no ground for district court review of the issues raised in West Penn's complaint.

III. *Jurisdiction and the Due Process Clause*

West Penn avers that "[i]n dismissing the instant suit for lack of jurisdiction and denying a hearing on the merits of all the issues raised in the Amended Complaint, the learned District Court has interpreted the Clean Air Act and its [sic] decision in *Getty Oil* in a manner which deprives West Penn of its due process right to a hearing guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution." Brief for Plaintiff-Appellant at 23.

West Penn is not claiming that it *has* been denied due process by any action of the defendants. It argues, rather, that it will not receive constitutional due process elsewhere than in a federal court hearing held prior to any other proceedings which are available to resolve the differences between the utility and the defendants. Yet at least two avenues of relief are open to West Penn, besides the present suit.

West Penn has taken the initiative in pursuing one of these alternatives by appealing to the Pennsylvania DER Environmental Hearing Board. Since the Board's

decision is appealable to the Pennsylvania courts, 71 Purdon's Pa. Stats. § 1710.41, West Penn has taken the first step to state court settlement of its dispute with Goddard.[32]

Consistent with Article VI of the Constitution, providing, *inter alia,* that the "Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .," the Supreme Court of the United States has operated under the assumption that the state judges who have sworn to uphold such Constitution will afford due process of law to the litigants before them. See *Huffman v. Pursue,* 43 U.S.L.W. 4379, 4385 (No. 73-296, U.S., Mar. 18, 1975); *cf. Johnson v. Mississippi,* 43 U.S.L.W. 4553, 4555 (No. 73-1531, U.S., May 12, 1975).[33]

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32. See note 11, *supra.* West Penn will receive an adjudicative hearing before the Board. The rules of procedure at the hearing, set forth in the Pennsylvania Administrative Agency Law, 71 Purdon's Pa. Stats. §§1710.1 *et seq.,* comply with due process requirements as set forth in *Goldberg v. Kelly,* 397 U.S. 254 (1970).

West Penn cites this court's decision in *Duquesne Light Co. v. EPA,* 481 F. 2d 1, 9 (3d Cir. 1973), for the proposition that it would not be accorded due process if it were relegated to its remedies under Pennsylvania law. This assertion is rejected. In *Duquesne,* the parties had already received a hearing before the Board which the court determined, from an examination of the record, was inadequate. The decision in *Duquesne* in no way implies that such a hearing is per se inadequate. We also note that West Penn errs in stating it is in the same position as the parties in *Duquesne.* Those parties were in the Circuit Court by virtue of having brought a §1857h-5(b)(1) suit. 481 F. 2d at 5. West Penn did not bring this suit under that section of the Clean Air Act.

33. In *Huffman v. Pursue, Ltd.,* 43 U.S.L.W. 4379, 4383, the Court used this language:

Also, in view of the strong state interest in maintaining the public health through abatement of air pollution, see 42 U.S.C. § 1857c-4(b)(1) and (2), and the broad discretion delegable to public officials in the application and enforcement of health laws, *cf. Zucht v. King,* 260 U.S. 174 (1922), we see no justification for federal court interference with the state court remedies available to the parties in this case. *Duke v. Texas,* 477 F. 2d 244 (5th Cir. 1973), *cert. denied,* 415 U.S. 978 (1974).

The second route to relief is opened by 42 U.S.C. § 1857c-8(a)(4), see Part II above. At the time West Penn brought this action, it had received only a notice of violation from Train. After receiving the notice, West Penn had the opportunity both for informally negotiating its differences with Train[34] and for presenting its

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"Even assuming, *arguendo,* that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger [v. Harris,* 401 U.S. 37 (1971)] militate against such a result."

(Footnote omitted.)

34. The utility has availed itself of this opportunity. West Penn and the EPA conferred on several occasions during the pendency of the suit. After these conferences, EPA issued an administrative order requiring West Penn to adopt and implement a procedure for complying with the Pennsylvania emission standards. EPA gave West Penn the choice of switching to low sulfur oil or to install a scrubber by December 31, 1978. The original March 1, 1975, deadline for submission of a compliance plan was extended to May 1, 1975. Each of

cause to a federal district court, should EPA take formal steps to enforce the regulations allegedly violated by West Penn.[35] Thus West Penn has future relief available to it in both the state and federal courts. Also, West Penn has not advanced any reason that due process requires one federal court suit—initiated by West Penn—but prohibits another federal court suit that might later be initiated by EPA. It is difficult to postulate in advance that two federal court proceedings which are governed by the same rules of procedure would have different results in terms of due process. See also *Getty, supra,* at 357; 42 U.S.C. § 1857h-5(c).

West Penn's argument thus appears to misapprehend the nature of due process. Due process requires, essentially, only a full and fair hearing before an impartial tribunal "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Goldberg v. Kelly,* 397 U.S. 254 (1970). A hearing which comports with due process[36] must ordinarily

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the final deadlines for reducing West Penn's emissions to meet the Pennsylvania standards was similarly extended for 60 days.

35. In *Getty,* the court noted that the plaintiff there would "be foreclosed from raising these objections in a civil and criminal proceeding for enforcement" because it had not pursued its exclusive remedy under § 1857h-5(b)(1). Since we have determined that West Penn's claims could not have been raised in a subsection (b)(1) proceeding, we conclude that West Penn is free to argue them in an enforcement proceeding.

36. It is axiomatic that due process is protean, its actual form at any time being a function of the rights and interests at stake in a given proceeding. *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 610 (1974). Thus we make no attempt to give a detailed description of a hearing which provides procedural due process.

be accorded before a party can be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). See *Goldberg, supra; Mattern v. Weinberger,* No. 74-1776 (3d Cir. 1975). But see *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974); *Richardson v. Perales,* 402 U.S. 389 (1971). The hearing, however, need not be in federal court. See *Arnett v. Kennedy,* 416 U.S. 134 (1974); *In-Cho Chung v. Park, et al.,* Nos. 74-1875, 74-1876 (3d Cir., Apr. 11, 1975). Thus a party is not deprived of due process who, having no federal cause of action, is relegated to the state courts for redress. See, *e.g., Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 632 (1875); *Huffman v. Pursue, supra.* Nor is a party deprived of due process merely because it must seek administrative resolution of its claims before it has access to the courts. *Crowell v. Benson,* 285 U.S. 22 (1932); *Estep v. United States,* 327 U.S. 114 (1946); *Barnes v. Chatterton, et al.,* No. 74-1570 (3d Cir., May 6, 1975); *Getty, supra* at 356 *ff.* See also *Jaffe, supra* at 381-89.[37] Further, since West Penn has not adduced, and we have not discovered, any other statutory basis than the APA for district court jurisdiction of this suit, this due process argument also

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37. Were the rule otherwise, no court could require a party to exhaust administrative remedies before suing in a judicial forum. Yet the doctrine of exhaustion is widely accepted. See, *e.g., Barnes, supra*; *Jaffe, supra* at 424 ff.; 3 K. Davis, Administrative Law, §§ 20.01 *et seq.* (1958 ed. and 1970 Supp.). Also, the Supreme Court has stated on several occasions that delegation of the power to entrust enforcement of statutory rights to an administrative process is not a violation of the constitutional right to a jury trial under the Seventh Amendment. See *Pernell v. Southall Realty,* 416 U.S. 363, 383 (1974), and cases there cited.

appears to misunderstand the power of the federal courts.

In *Sheldon v. Sill,* 49 U.S. (8 How.) 440, 448-49 (1850), the Court described the jurisdiction of the federal courts as being limited, first by the constitutional definition of federal court powers and, second, by the congressional distribution of jurisdiction:[38]

> "It has been alleged that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.
>
> "It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result,—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to

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38. The concept of federal courts as exercising only limited, as opposed to general, jurisdiction was hardly original with *Sheldon.* See, *e.g., Marbury v. Madison,* 5 U.S. (1 Cranch.) 137 (1803). Just how limited federal jurisdiction actually is has been the subject of active debate. See generally, P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Court and the Federal System, 314-24; 330-75 (1973).

follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

"The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

"Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary."

The holding of *Sheldon,* reaffirmed countless times, requires a statutory basis for district court jurisdiction of West Penn's action. The mere invocation of "due process" cannot without more furnish such a basis in this suit.

Finally, even if we did discover a statutory grant of jurisdiction, the inapplicability of the APA would pose immunity barriers to this suit against Train, while the policy against federal court intervention in the state administrative process would prevent suit against Goddard. *Beale v. Blount,* 461 F. 2d 1133, 1138 (5th Cir. 1972). See *Huffman, supra* at 4383-84; Jaffe, *supra* at 213-31, 327-29.

For the foregoing reasons, the June 19, 1974, district court order will be affirmed.[39] Costs will be taxed against appellant.

TO THE CLERK:

Pleas file the foregoing opinion.

.....

Circuit Judge

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39. We are not precluded from affirming the district court's order, even though we disagree with that court's determination that jurisdiction was lacking because 42 U. S. C. §1857h-5(b)(1) provided West Penn's exclusive remedy. *Rhoads v. Ford Motor Co.,* No. 74-1626, slip op. at 5 (3d Cir., Apr. 30, 1975); *Tunnell v. Wiley,* No. 74-1245, at n. 4 (3d Cir., April 1, 1975); *Litwicki v. Pittsburgh Plate Glass Industries, Inc.,* 505 F. 2d 189, 192 n. 4 (3d Cir. 1974).

WEST PENN POWER COMPANY, a corporation, appellant v. RUSSELL TRAIN, etc., et al.—No. 74-2050

ADAMS, *Circuit Judge,* dissenting.

I respectfully dissent from the majority's decision because I believe that a notice by the federal Environmental Protection Agency that a firm is violating a federally approved air pollution regulation is, under the specific factual configuration here, judicially reviewable under the Administrative Procedure Act (APA).[1]

Pursuant to the Clean Air Act Amendments of 1970[2] the Administrator of the Environmental Protection Agency issued a national primary ambient air quality standard regulating the permissible concentration of sulfur oxides.[3] Under the Act, each state is required to develop and submit for approval by the Administrator an implementation plan designed to achieve the Administrator's air quality standards.[4] Once a state's plan has been ratified by the EPA, it becomes enforceable as a federal regulation.

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1. 5 U.S.C. §§701 *et seq.* (1967)

2. Pub. L. 91-604, 84 Stat. 1676.

3. Under 42 U.S.C. §1857c-4, the Administrator is directed to fix national primary and secondary ambient air quality standards for air pollutants detracting from the public health or welfare. *See* 42 U.S.C. §1857c-3.

Primary ambient air quality standards are those necessary, in the Administrator's judgment, to protect national health. Secondary ambient air quality standards are those necessary, in the Administrator's judgment, to preserve the general welfare. *See* 42 U.S.C. §1857c-4(b).

4. 42 U.S.C. §1857c-5.

After the Administrator approved the Pennsylvania plan, which included a provision intended to achieve compliance with the Administrator's limitation on the proportion of sulfur oxides in the ambient air, West Penn did not exercise its right to challenge the EPA's approval in the federal courts.[5] West Penn did, however, in accordance with the terms of the Pennsylvania plan, petition the Pennsylvania Department of Environmental Resources (DER) for a variance from the plan's sulfur oxide emission[6] restriction as it applied to the company's Boiler No. 33 at its Mitchell Power Station.

On September 13, 1973, before DER had acted on West Penn's request for a variance, West Penn received from EPA a notice that Boiler No. 33 was in violation of the federally approved Pennsylvania implementation plan. Subsequently, on September 19, 1973, DER granted West Penn a temporary variance from the sulfur oxide emission restriction, conditioned upon West Penn's proceeding with the installation of a flue gas desulfurization device, referred to as a "scrubber." The EPA has not approved this variance from the Pennsylvania plan.[7]

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5. 42 U.S.C. §1857h-5(b)(1) permits a party aggrieved by the Administrator's approval of any implementation plan to seek review in the court of appeals for the appropriate circuit within 30 days of the Administrator's action.

6. Although West Penn Power sought variances from several of the plan's emission limitations, only the sulfur oxide restriction is relevant to this appeal.

7. A variance from an EPA accepted state implementation plan must be approved by the EPA before the polluter is sheltered from federal enforcement of the emission limitations contained in the implementation plan. 42 U.S.C. §§1857c-8; 1857c-5(d); 1857c-5(a)(3). For a discussion of the procedure for obtaining EPA

West Penn, dissatisfied with the state's conditioning the variance upon the installation of a scrubber, appealed the DER's order to the Pennsylvania Environmental Hearing Board.[8]

West Penn then sued[9] the Administrator of the EPA, the DER, and the Secretary of the DER. The company requested a declaratory judgment that West Penn was not in violation of the Pennsylvania implementation plan and that the defendants had no right to reject West Penn's proposal for achieving compliance by use of a tall stack.[10] The firm also asked for preliminary and permanent injunctions barring the Administrator from proceeding to enforce the September 13, 1973 notice of violation and preventing DER and its Secretary from enforcing their order, in response to West Penn's variance application, directing the utility to install a scrubber.

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approval of such a variance, see *Train v. Natural Resources Defense Council,* 43 U.S.L.W. 4467 (U.S., Apr. 16, 1975). West Penn did not ask the district court to compel the Administrator to approve the variance, and we need not therefore decide whether such a remedy would be available to the company.

8. *See* 35 Pa. Stat. Ann. §§4004(4.1), 4013.5 and 71 Pa. Stat. Ann. §1710.41.

9. West Penn's original complaint did not name the Secretary as a defendant.

10. The primary and secondary ambient air quality standards issued by the Administrator define maximum permissible concentrations of sulfur oxides in the atmosphere. A scrubber is intended to achieve these standards by removing the pollutants from exhaust gases before they are discharged. In contrast, tall stacks are designed to reduce the atmospheric concentrations by dispersing the compounds over a wider area.

The district court granted motions to dismiss with respect to all the defendants. The trial judge concluded that the action against DER was barred by the Eleventh Amendment. As to the Secretary, the court held that, although the Eleventh Amendment did not prohibit the suit, the district court had no jurisdiction because, insofar as the suit was a challenge to the Pennsylvania implementation plan, it was barred by 42 U.S.C. § 1857h-5(b)(2).[11] In any event, the trial judge held that he had no authority to interfere with the exercise of discretion by the Secretary of DER in issuing variances, or to compel the state to submit variances for EPA approval.[12] As detailed more fully in the majority opinion, the district court, relying in large measure on 42 U.S.C. § 1857h-5(b)(2) and *Getty Oil,*[13] also rejected all the proffered bases for its jurisdiction to hear the suit against the Administrator.

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11. 42 U.S.C. § 1857h-5 provides, in relevant part:
(b)(1) . . . A petition for review of the Administrator's action in approving . . . any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such . . . approval . . ., or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

12. West Penn did not appeal the dismissal of DER. The majority affirms the dismissal as to the Secretary.

13. *Getty Oil v. Ruckelshaus,* 467 F.2d 349 (3d Cir. 1972), *cert. denied* 409 U.S. 1125 (1973).

The majority discerns that one of the arguments pressed by West Penn is that, aside from any variance, a tall stack strategy is a permissible method of complying with the implementation plan, and therefore West Penn is not contravening the plan. The majority states that this contention does not constitute a justiciable issue between West Penn and the Administrator under the APA, first, because the issuance of a notice of violation by the EPA is not "final agency action," and second, because the Administrator is invested with substantial discretion in determining whether compliance procedures should be initiated. I disagree.[14]

The APA is to be liberally construed in favor of affording judicial review of administrative actions. In the words of Justice Harlan in the landmark case of *Abbott Laboratories v. Gardner,* the " 'generous review provisions' [of the APA] must be given a 'hospitable interpretation.' "[15] Judicial supervision of agency conduct is not precluded "unless there is persuasive reason to believe that such was the purpose of Congress."[16] The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' "[17] As this Court recently declared, albeit in the context of a

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14. Of course, I express no opinion on the merits of West Penn's claim that tall stacks are sufficient, an issue which was not addressed by the district court and which the parties have not briefed or argued here.

15. 387 U.S. 136, 140-41 (1967).

16. *Id. See Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955); *Rusk v. Cort,* 369 U.S. 367 (1962).

17. 387 U.S. at 140.

case in which we found an express Congressional prohibition against judicial review of the agency action in question:

> Federal agencies should not be able to retreat behind the concept of no judicial review unless Congress has specifically authorized such a bar.[17a]

Section 1857h-5(b)(2) Does Not Bar West Penn's Suit

As the majority states, this Court's interpretation in *Getty Oil* of 42 U.S.C. § 1857h-5(b)(2) does not impede West Penn's attempt to have the trial court decide whether the company has fulfilled its responsibilities under the Pennsylvania plan. Instead of seeking judicial review of the EPA's approbation of the Delaware implementation plan, Getty asked the state for a variance delaying the effective date of the plan's restriction on the sulfur content of fuels burned in a particular region of the state. The state administrative agencies denied the variance, but the state courts temporarily restrained Delaware from enforcing the restriction. While the state was so restrained, however, the EPA demanded compliance. Getty asked this Court to set aside EPA's order on the grounds that primary air quality standards had already been reached and that compliance, prior to the development of alternative technology, would impose an unreasonable economic burden. The panel held that we could not in the procedural posture of that case entertain economic or technological objections to the plan.

Getty interpreted section 1857h-5(b)(2) to foreclose later judicial inquiry with respect to issues which

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17a. *Pollard v. Romney,* 512 F.2d 295, 298 (3d Cir. 1975).

could have been raised before a court of appeals in a suit challenging federal approval of a state implementation plan within 30 days after such approval. West Penn's contention that it has acted in conformity with the plan, however, unlike Getty's argument, does not take exception to the validity of the plan. At least with respect to this issue, West Penn in essence concedes the legitimacy of the Pennsylvania plan and asserts that the company has obeyed it. This issue could not have been raised in a suit contesting EPA's approval of the plan. Thus section 1857h-(b)(2) does not furnish "clear and convincing evidence," or indeed any evidence, that Congress intended to prevent judicial review of the question whether West Penn may comply with the Pennsylvania plan by constructing a tall stack.

The September 13, 1973 Notice of Violation Issued by EPA Represents Final Agency Action.

In order to assess whether the notice of violation constitutes "final" agency action "committed by law to agency discretion" within the meaning of the APA[18]—a characterization of the EPA's role made by the majority in sustaining the district court—it is necessary to outline the statutory enforcement procedures under the

18. 5 U.S.C. § 701(a) provides in pertinent part:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review.
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 704 provides in part:

> [F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.

Clean Air Act. Whenever the EPA learns that any person is in violation of a federally-sanctioned implementation plan, the Administrator "shall notify the person in violation of the plan and the State in which the plan applies of such finding."[19] If the failure to conform to the plan continues beyond 30 days from the date of the notice of violation, the Administrator may commence a civil enforcement action in the district court or "may issue an order requiring such person to comply" with the plan.[20] Any such order "shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.[21] Whether or not any enforcement suit has been filed or any compliance order issued, however,

> [a]ny person who knowingly violates any requirement of an applicable implementation plan . . . more than 30 days after having been notified by the Administrator . . . shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or both."[22]

The penalities for failure to obey a compliance order are the same as those for failure to abate pollution within 30 days of a notice of violation.[23] If a conviction under this section is not the offender's first, the penalties are doubled.[24]

19. 42 U.S.C. § 1857c-8(a)(1).
20. *Id.*
21. 42 U.S.C. § 1857c-8(a)(4).
22. 42 U.S.C. § 1857c-8(c)(1).
23. *Id.*
24. *Id.*

Determination of the "finality" of agency action under the APA must be viewed pragmatically. In *Frozen Food Express v. United States,* for example, the ICC had issued an order stating that specified goods did not qualify for the "agricultural commodities" exemption from the statutory requirement that motor carriers possess a permit or certificate. The Supreme Court ruled that this was a final order. Although the decree under attack did not directly command the plaintiff carrier to do or not to do any particular act, the Court considered the order final and justiciable because it had "an immediate and practical impact" on motor carriers and shippers:

> The determination made by the Commission is not therefore abstract, theoretical, or academic. . . . The "order" of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. . . . Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks.[25]

As I have previously observed, the triad of Supreme Court decisions in *Frozen Foods, Storer Broadcasting*[26] and *CBS*[27] has an overarching importance which reaches beyond the particular facts involved there. In view of the continuing significance afforded to those decisions by the courts, the principles adopted in them

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25. 351 U.S. 40, 43-44 (1956). *See United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956); *Abbott Laboratories,* 387 U.S. at 149-51.

26. *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956).

27. *Columbia Broadcasting v. United States,* 316 U.S. 407 (1942).

constitute a "rule" of federal administrative law which favors review where the impact of agency action is, as in this case, concrete and immediate.[28]

Here, further proceedings within the agency are not necessary before the Administrator's decision is enforceable against West Penn.[29] The notice of violation, independent of any further proceedings thus has a coercive effect upon the utility. Continuation of West Penn's present compliance strategy beyond 30 days from the date of the notice would render the company subject to the possibility of a $25,000 fine for each day of continued violation and would impose on the corporate officers the risk of imprisonment if the EPA's interpretation of the implementation plan is eventually adjudicated correct.

On the other hand, compliance with the plan as construed by the Administrator would require the immediate commencement of the installation of a multi-million dollar scrubber device[30] or the prompt shutdown of the power plant. The choice faced by West Penn is analogous to that of the drug companies in *Abbott Laboratories;* if the drug manufacturers wished to conform to the agency's labeling requirements,

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28. *PBW Stock Exchange v. Securities and Exchange Comm'n,* 485 F.2d 718, 741 (3d Cir. 1973) (dissenting opinion), *cert. denied* 416 U.S. 969 (1974).

29. See 42 U.S.C. § 1857c-8(c)(1).

30. West Penn represented to the district court that installation of a scrubber at the plant in question would require an expenditure in excess of $23 million and that operation of the equipment would increase operating costs by $6.5 million annually. The Administrator has not disputed the order of magnitude of these figures.

> [T]hey must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance . . . would risk serious criminal and civil penalties. . . .[31]

Thus the notice of violation here, like the regulation in *Abbott*, is final agency action because it impels the company to accede to the dictates of the Administrator.[32]

Also, the notice of violation here is reviewable as final action because judicial resolution of the question whether West Penn's proposed mode of pollution control is interdicted by the state plan would not unduly disrupt the systematic processing of the case within the EPA.

> [T]he relevant considerations in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined.[33]

The notice that West Penn has failed to adapt to the Pennsylvania plan represents the Administrator's definitive interpretation of the plan. His conclusion was not merely tentative. Nor did the company's complaint

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31. 387 U.S. at 151-53.

32. *See also National Automatic Laundry and Cleaning Council v. Shultz,* 443 F.2d 689, 698 (D.C. Cir. 1971).

33. *Port of Boston Marine Terminal Assoc. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 70-71 (1970).

present to the district court an abstract question or a hypothetical situation. No further administrative proceedings were necessary before a suit could be commenced by the EPA compelling compliance with the plan and extracting the statutory penalty. Although the Administrator may decide when enforcement measures should be taken and whether the agency should issue a compliance order[34] or go directly to the district court, those determinations ordinarily will not include a reinterpretation by the Administrator of the implementation plan. Thus there were no on-going administrative functions which could be disrupted by judicial review as requested by West Penn.

Review Should Not be Denied Here Because of the Possibility of Enforcement Proceedings in the Future

As discussed earlier, since the issue of its compliance with the plan could not have been adjudicated in an action taking exception to federal approval of the plan, West Penn would be free to assert in any litigation brought to compel obedience to the plan or to a compliance order—as well as in any suit to impose a penalty — that it has already conformed to the plan by installing a tall stack. The possibility of a subsequent enforcement proceeding, however, does not generally prevent review of agency action at the request of an aggrieved party where, as here, that party may reasonably be intimi-

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34. A compliance order was issued to West Penn on February 18, 1975, subsequent to the decision by the district court.

dated into acquiescing in the administrative ruling before he can obtain a hearing at the enforcement stage.[35]

Under the statutory scheme here the Administrator may indefinitely delay invoking the power of the district courts so as to force West Penn into what the EPA considers compliance with the plan. Yet for each day of violation beyond an initial 30 days period West Penn would possibly incur a substantial fine. Thus, because of the potential liability if its good-faith interpretation of the plan is incorrect, West Penn may not be able, as a practical matter, to defy the EPA for any prolonged period. Therefore, whether or not due process is satisfied by the enforcement action, that proceeding, the timing of which is entirely within the control of the agency, provides an inadequate forum under the APA for adjudicating the rights of the utility.

The state legislation before the Supreme Court in the historic case of *Ex Parte Young* possessed a similar *in terrorem* effect.[36] That case, of course, arose long before the enactment of the APA and in any event involved state rather than federal administrative actions. The Court's description of the impact of the legislation, however, may be instructive here. The railroads in *Young* sought an adjudication that the rates set by the state regulatory commission were so low as to be confiscatory. State law imposed a fine of up to $5,000 as well as imprisonment for each transaction in which the rate charged exceeded the regulated rate. The Court stated, "The officers and employees could not be expected to disobey any of the provisions of the acts or orders

35. *See Abbott Laboratories,* 387 U.S. 136; *United States v. Storer Broadcasting,* 351 U.S. 192 (1956).

36. 209 U.S. 123 (1908).

at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company."[37]

Enforcement of the Pennsylvania Implementation Plan is Not Action "Committed to Agency Discretion by Law" so as to Preclude Judicial Review

Judicial consideration of West Penn's assertion that its tall-stack stragegy is in harmony with the state plan is not forestalled by the fact that Congress has left to the Administrator the tactical decisions when and by what method the EPA can most effectively execute the implementation plans. Although the APA provides an exception to the regime of judicial supervision in those cases where "agency action is committed to agency discretion by law,"[38] that exception is applicable only in those discreet and infrequent situations where Congress explicitly expressed an intent that the judgment of the executive branch be wholly unfettered. The Supreme Court has explained that this is "a very narrow exception. . . . [I]t is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[39]

Although some aspects of a given decision may be committed entirely to the policy judgment of an expert administrator, where *legal* standards are implicated the courts are available to persons aggrieved by the decision

37. *Id.* at 146.

38. 5 U.S.C. § 701(a)(2).

39. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971).

in order to assure that the agency adhered to the proper standards in carrying out its duty.[40]

> An "all or nothing" approach to reviewability would, in specific cases, either be unfair to persons aggrieved by agency action, or impose an unwise burden upon the agency or the courts. Accordingly, separable issues appropriate for judicial determination are to be reviewed, though other aspects of the agency action may be committed to the agency's expertise and discretion.[41]

In the case at hand, the question whether tall stacks meet air purity requirements of the applicable implementation plan is a legal issue wholly divorced from the Administrator's exercise of discretion in concluding at what time and in what manner the plan should be enforced in order to maximize the public benefit. A resolution now by the district court of the issue raised by West Penn would be confined to an interpretation of the plan and need not in any way interfere with the proper and expeditious functioning of the EPA.

Conclusion.

Since the APA embodies a presumption of federal review, since the issuance of a notice of violation in this context has an immediate and grave impact on the alleged polluter, since adjudication of a claim that the

40. *East Oakland-Fruitvale Planning Council v. Rumsfeld,* 471 F.2d 524, 534 (9th Cir. 1972); *Scanwell Laboratories v. Schaffer,* 424 F.2d 859 (D.C. Cir. 1970); *Cappadora v. Celebrezze,* 356 F.2d 15 (2d Cir. 1966).

41. *East Oakland-Fruitvale Planning Council,* 471 F.2d at 533. See, e.g., *Dunlop v. Bachowski,* 43 U.S.L.W. 4669 (U.S., June 2, 1975); *Campaign Clean Water, Inc. v. Train,* 489 F.2d 492, 498; (4th Cir. 1973); *Parker v. United States,* 448 F.2d 793, 797-98 (10th Cir. 1971); *Reddy, Inc. v. Dept. of Labor,* 492 F.2d 338, 544 (5th Cir. 1974).

alleged polluter is obeying the applicable implementation plan would not interfere with the discretionary functions entrusted to the Administrator, and since no other effective judicial review is available, I would hold that the APA furnishes a basis upon which an alleged polluter may obtain a forum for prompt resolution of his claim that he has accommodated his conduct to the implementation plan.

There is a strong public interest in the expeditious resolution of this type of dispute. If West Penn is relegated to reliance on some distance enforcement hearing, the threat of a $25,000-a-day penalty may impel the company to undergo an unnecessary expense of millions of dollars, which will have to be borne either by the firm's shareholders or, more likely, its ratepayers. On the other hand, if the Administrator's interpretation of the plan is correct, in the absence of a hearing, West Penn may in good faith continue to imperil the public health and welfare by exceeding the permissible concentration of pollutants. Accordingly, I would remand the cause to the district court for consideration whether the proposed tall stack fulfills the requirements of the plan.[42]

42. Since the majority reaches the merits of the applicability of the APA to this dispute, I assume, without deciding, that if the APA is not itself jurisdictional in nature, *Zimmerman v. United States,* 422 F.2d 326, 330-31 (3d Cir. 1970), jurisdiction would be under one of the general grants of jurisdiction, such as 28 U.S.C. § 1337. *See Dunlop v. Bachowski,* 43 U.S.C.W. 4669, 4671 (U.S., June 2, 1975); *Davis v. Romney,* 490 F.2d 1360 (3d Cir. 1974). Although the district court rejected § 1337 as a basis for jurisdiction, it did so apparently in reliance on section 1857h-5(b)(2). The majority's statement, at fn. 26, that West Penn does not appeal that ruling by the trial judge appears to take an unnecessarily restrictive view of West Penn's contentions.

APPENDIX "H"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-2050

WEST PENN POWER COMPANY, a corporation,
Appellant

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania and MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and GARTH, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Rosenn would grant the petition for rehearing.

Also Judge Adams and Judge Hunter would grant the petition for rehearing.

By the Court,

VAN DUSEN
Judge

Dated: August 15, 1975

APPENDIX "I"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1259

WEST PENN POWER COMPANY, a corporation,
Petitioner

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent

ON PETITION FOR REVIEW OF ACTION OF THE ENVIRONMENTAL PROTECTION AGENCY

Argued October 2, 1975
Additional Letter Memoranda Filed
June 30 and July 8, 1976
Before MARIS, VAN DUSEN and HUNTER,
Circuit Judges

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Environmental Protection Agency;
Attorneys for Respondent

Opinion of the Court

(Filed July 30, 1976)

PER CURIAM:

Petitioner, West Penn Power Company, seeks review under § 307(b)(1) of the Clean Air Act, 42 U. S. C. § 1857h-5(b)(1), of the action of the Administrator of the Environmental Protection Agency in approving the Commonwealth of Pennsylvania implementation plan for the attainment of national ambient air quality standards. West Penn contends that it is economically and technologically infeasible for one of its facilities, Boiler No. 33 at the Mitchell Power Station, to comply with the emission limitations established by the implementation plan.[1] It asserts that this case must be remanded to the Administrator with directions for him to consider West Penn's economic and technological objections. We deny the petition for review.

In *Union Electric Co. v. EPA*, 44 U. S. L. W. 5060 (U. S., June 25, 1976), the Supreme Court held that:

> "[C]laims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years. And, since we further conclude that the States may submit implementation plans more stringent than federal law requires and that the Administrator must approve such plans if they meet the minimum requirements of § 110(a)(2), it follows that the language of § 110(a)(2)(A)

1. The background of this case appears more fully in *West Penn Power Co. v. Train*, 522 F. 2d 302 (3d Cir. 1975).

> provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible. Accordingly, a court of appeals reviewing an approved plan under § 307(b)(1) cannot set it aside on those grounds, no matter when they are raised."

West Penn attempts to distinguish the instant case from *Union Electric* on the basis of footnote 19 in that case, which states:

> "Petitioner has briefed its contention that the Due Process Clause of the Fifth Amendment demands that at some time it be afforded the opportunity to raise before a court claims of economic and technological impossibility. This claim was neither presented to, nor considered by, the Court of Appeals, and we declined to grant certiorari on the question. . . . In any case, we could not resolve petitioner's claim here, for there has been no showing that a § 307(b)(1) appeal would be the only opportunity for petitioner to raise before a court its claims of economic and technological impossibility."

In *West Penn Power Co. v. Train (West Penn I)*, 522 F. 2d 302 (3d Cir. 1975), we held that the district court did not have jurisdiction to hear West Penn's challenges to the Administrator's actions. Because of that holding, West Penn asserts, the instant action is the only means available to it to raise claims of economic and technological infeasibility before a court, and that to deny it an opportunity to raise these claims in this action would violate due process.

We reject West Penn's assertion that the instant case is distinguishable from *Union Electric*. There has been no showing that our previous decision (*West Penn I*) prevents West Penn from receiving meaningful judicial consideration of its feasibility contentions.[2]

To the extent that *West Penn I* relied on the availability of review of economic and technological feasibility claims under § 307(b)(1) of the Act, 42 U. S. C. § 1857h-5(b)(1), the Supreme Court's decision in *Union Electric* has eroded its authority. *West Penn I's* holding that the Administrative Procedure Act (APA)[3] does not provide an independent source of jurisdiction has continuing validity, but it has not been shown, and *West Penn I* did not hold, that judicial review of EPA action under the APA would not be within the jurisdiction of the federal courts under a general grant of jurisdiction in Title 28 of the United States Code.[4] Moreover we note that the decision in *West Penn I* that the notice of violation sought to be reviewed in that case was not final

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2. See *Union Electric Co. v. EPA*, 44 U. S. L. W. 5060, 5066 n. 19 (U. S., June 25, 1976). We note that the Court stated that:

> "Claims of technological or economic infeasibility, the Administrator agrees, are relevant to fashioning an appropriate compliance order under § 113(a)(4)."

3. 5 U. S. C. § 701 *et seq.*

4. See *Dunlop v. Bachowski*, 421 U. S. 560, 564-66 (1975); Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 Harv. L. Rev. 980, 981-85 (1975). We note that West Penn did claim jurisdiction under 28 U. S. C. § 1337 in the district court during the *West Penn I* litigation, but did not appeal the district court's denial of jurisdiction under that section. We express no opinion on whether the Clean Air Act is an "act regulating commerce" within the meaning of § 1337. We also note that a claim of jurisdiction under § 1331 was presented to neither the district court nor to us.

agency action and, therefore, not reviewable under 5 U. S. C. § 704, would not be dispositive if West Penn were to commence an action seeking review of the compliance order which has now been issued.[5] Whether the compliance order is final we do not decide; we merely conclude that *West Penn I* did not resolve that question.

We find the Supreme Court's decision in *Union Electric* to be controlling, and on that basis we dismiss the petition for review.

TO THE CLERK: Please file the foregoing opinion.

.....

Circuit Judge

5. See *West Penn I, supra,* 522 F. 2d at 312 n. 33.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 75-1259
WEST PENN POWER COMPANY,
a corporation,
Petitioner
v.
RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent
ON PETITION FOR REVIEW OF ACTION OF THE ENVIRONMENTAL PROTECTION AGENCY
Present: MARIS, VAN DUSEN and HUNTER, *Circuit Judges*

Judgment

This cause came to be heard on the parties' briefs and appendix and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review of the order of the Environmental Protection Agency dated May 31, 1972, be, and the same is hereby dismissed. Costs taxed against the petitioner.

ATTEST:

.....

Clerk

July 30, 1976

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1259

WEST PENN POWER COMPANY,
a corporation,
Petitioner
v.
RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent

Present: MARIS, VAN DUSEN and HUNTER, *Circuit Judges.*

It is ORDERED that petitioner's MOTION FOR ORAL ARGUMENT AND ADDITIONAL COMMENTS ON UNION ELECTRIC v. EPA, filed July 14, 1976, is denied insofar as the request for oral argument is concerned.

BY THE COURT:

VAN DUSEN
Circuit Judge

Dated: July 30, 1976

Sur Petition for Rehearing.

APPENDIX "J"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 75-1259
WEST PENN POWER COMPANY,
a corporation,
Petitioner
v.
RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* and MARIS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and GARTH, Circuit Judges.

The petition for rehearing filed by West Penn Power Company, petitioner, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

The Request for Extension of Stay of Enforcement is denied.

BY THE COURT,

FRANCIS L. VAN DUSEN
Judge

Dated: September 15, 1976

APPENDIX "K"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 75-1259
WEST PENN POWER COMPANY,
a corporation,
Petitioner
v.
RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America,
Respondent

Order Staying Judgment

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 22, 1976. No further stay will be granted, without prejudice to the right of appellant to apply to the Supreme Court of the United States for a stay, since the denial of the Petition for Rehearing has determined the Petition for Review.

FRANCIS L. VAN DUSEN
Circuit Judge

Dated: September 29, 1976

APPENDIX "L"

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
ENVIRONMENTAL HEARING BOARD

In the Matter of: WEST PENN POWER COMPANY v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	Docket No. 73-330-D

Motion to Dismiss

And now comes the Commonwealth of Pennsylvania, Department of Environmental Resources ("Department"), and moves this Honorable Board to dismiss Appellant's appeal, stating as follows:

1. This matter is an appeal from the Department's action on Appellant's "Amended Petition for Variance" under Chapter 141 of the Department's Rules and Regulations, 25 Pa. Code Chapter 141. A copy of said Amended Petition is attached hereto as Exhibit "I".

2. The Pennsylvania Environmental Quality Board adopted Sections 141.1 through 141.44 of the Department's Rules and Regulations (25 Pa. Code §§141.1 through 144.44) on January 27, 1972. 2 Pa. B. 383 (March 4, 1972).

3. Section 141.2(b) of those Rules and Regulations, 25 Pa. Code §141.2(b), provides, in pertinent part:

(b) The Department will grant any petition for a temporary variance, in whole or in part, upon a review of the petition and accompanying material, and upon any additional investigations which the Department may conduct, provided the Department finds all of the following:

(1) Such action will not prevent or interfere with the attainment or maintenance of any air quality standards contained in this Article within the time prescribed for the attainment of such ambient air quality standard by the Clean Air Act.

(2) The quantity and level of emissions from the source at the expiration of the temporary variance are likely to comply with the applicable standards of this Article.

4. Section 141.4(a) of those Regulations, 25 Pa. Code §141.4(a), provides:

(a) Any temporary variance granted pursuant to this Chapter will be granted for a period of time not to exceed three years and may be renewed only once, such additional period of time not to exceed the period of time for which the variance was originally granted or two years, whichever is less.

5. Section 141.11(b)(5) of those Regulations, 25 Pa. Code §141.11(b)(5), provides:

(b) Petitions [for variances] shall include or be accompanied by all of the following:

(5) A detailed plan setting forth all steps the petitioner proposes to take to reduce emissions to a level permitted by this Article, including a

schedule indicating the dates upon which each intermediate step would be completed, and the dates upon which full compliance with the standards and requirements of this Article would be achieved.

6. On October 26, 1972, Act 245, P.L. 989 amended the Pennsylvania Air Pollution Control Act ("APCA"), 35 P.S. §4001 *et seq.*, by adding thereto, *inter alia,* Section 13.5, 35 P.S. §4013.5.

7. Section 13.5(a) of the APCA provides:

The department shall have the power to grant temporary variances from the effect of any provision of this act, or of any rule or regulation adopted hereunder, which limits the emission of any air contaminant, and the Environmental Quality Board, subject to the provisions of this section, shall adopt rules and regulations setting forth the terms and conditions subject to which such variances shall be granted. Such rules and regulations shall not authorize the grant of a variance which will prevent or interfere with the attainment or maintenance of any ambient air quality standard imposed by Federal law within the time prescribed by such law for the attainment of such standard. (footnote deleted) . . .

8. Section 13.5(c) of the APCA provides, in pertinent part:

The rules and regulations with respect to variances adopted by the environmental quality board prior to the effective date of this act shall continue in full force and effect . . .

9. Pursuant to Section 109 of the Federal Clean Air Act, 42 U.S.C. §1857 *et seq.*, on November 25, 1971 the Administrator of the United States Environmental Protection Agency established national primary and secondary ambient air quality standards for sulfur oxides. 36 Fed. Reg. 22384, 40 CFR §§50.4 and 50.5.

10. Section 110(a)(1) of the Clean Air Act mandates that "[e]ach State shall . . . adopt and submit to the Administrator [of the Environmental Protection Agency (EPA)] . . . a plan which provides for implementation, maintenance and enforcement of such primary standard [and secondary standard] . . . in each air quality control region (or portion thereof) within such State."

11. Section 110(a)(2)(A)(1) of the Clean Air Act requires that a state's plan provide for the attainment of federal primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . ."

12. On January 27, 1972, the Commonwealth of Pennsylvania submitted its state implementation plan (SIP) to the EPA. Among the regulations included in the SIP and adopted by the EQB were §123.22 (25 Pa. Code §123.22) and §§141.1 through 141.44 (25 Pa. Code §§141.1 through 141.44). 2 Pa. B. 383 (March 4, 1972).

13. The Pennsylvania SIP was approved by the EPA Administrator on May 31, 1972, 37 Fed. Reg. 10889 (May 31, 1972), 40 CFR §52.2023. Once approved by the Administrator, the implementation, maintenance and enforcement regulations set forth in the SIP became federal law, binding and enforceable under the Clean Air Act.

14. On or about September 15, 1972, Appellant filed with the Department a "Petition for Variance" with respect to Appellant's Mitchell Power Station. This petition was amended by Appellant on June 7, 1973. [See Exhibit I hereto.] Appellant has not submitted any petition for renewal of its variance with respect to Boiler No. 33.

15. Appellant's "Amended Petition for Variance" requested a variance from the particulate matter emission limitations (25 Pa. Code §123.11) and visible emission limitations (25 Pa. Code §123.41) until January 18, 1974 for Boilers 1, 2 and 3 and until November 1, 1973 for Boiler No. 33. The Amended Petition also requested a variance from the sulfur compound emission limitation (25 Pa. Code §123.22) until January 18, 1974 for Boilers 1, 2 and 3 and until June 30, 1985 for Boiler No. 33. [Exhibit I, p. 2.]

16. The Amended Petition contained the following schedule for compliance with the particulate matter and sulfur compound emission limitations for Boilers 1, 2 and 3:

Boilers Nos. 1, 2 and 3 will be converted to oil firing. The compliance construction schedule is presently planned as follows:

Engineering Preparation	Complete
Complete Placement of All Contracts	Complete
Begin Construction	Complete
Begin Outage for Tie-In	November 3, 1973
In Service	December 23, 1973
Complete Operating Adjustments	January 18, 1974

[Exhibit I, pp. 2-3].

17. The Amended Petition indicated that particulate and visible emissions from Boiler No. 33 were already in compliance with the applicable regulations, and that the variance until November 1, 1973 was requested simply to allow for certain flue gas conditioning tests with low sulfur coal during the period July 1, 1973 to October 31, 1973. [Exhibit I, p. 3.]

18. Appellant's "Amended Petition for Variance" discussed alternate plans concerning the sulfur emissions from Boiler No. 33. Alternative I proposed installation of a tall stack to disperse boiler emissions some 700 feet above ground level, as well as ground-level monitoring stations. Under this alternate, Appellant stated no plan to reduce the quantity of emissions to the levels required by 25 Pa. Code §123.22, and it requested a "ten-year variance from existing emission standards to amortize the cost of new equipment." In Alternative II, Appellant stated it would investigate sulfur removal processes, and "if any such processes not presently being tested, have, in Petitioner's [Appellant's] estimation, a sufficiently high chance for success," [Exhibit I, p. 4] Appellant would install such a system. Under Alternative II, Appellant stated that such a system would require approximately 53 months to engineer and construct." [Exhibit I, p. 4.]

19. With respect to the sulfur-compound variance for Boiler No. 33, the Amended Petition summarized Appellant's request as follows:

> Therefore, under Alternative I, Petitioner would comply with all applicable ground-level concentration standards by April 1, 1977, but would require a variance from existing emission regulations until June 30, 1985, in order to amortize the cost of the facility. Under Alternative II, Petitioner would require a variance from existing emission standards and ground-level concentration standards at least until April 1, 1978, and possibly for an extended period thereafter, dependent upon the development of technology and future supply conditions. [Exhibit I. p. 4.]

20. Neither Alternative I nor Alternative II contained a definite commitment or detailed plan to reduce sulfur compound emissions from Boiler No. 33 to the levels required by 25 Pa. Code §123.22.

21. Both Alternatives I and II called for variances for a period of time greater than three years.

22. On September 19, 1973, the Department issued Variance Order No. 73-708-V ("Variance Order"), a copy of which is attached hereto as Exhibit II.

23. In the Variance Order, the Department granted all the variances requested as to Boilers 1, 2 and 3, as well as the particulate matter variance requested for Boiler No. 33.

24. With respect to sulfur compound emissions from Boiler No. 33, the Variance Order denied the variance requested by Appellant, but did grant a temporary variance until June 30, 1976, i.e., for a period of approximately three years. [Exhibit II, pp. 2 and 3.] It is from this portion of the Variance Order that Appellant has taken the instant appeal.

25. The Department has no authority to grant the variance requested by Appellant for Boiler No. 33's sulfur compound emissions, since, as noted in Paragraphs 18 through 21, above, the Amended Petition did not com-

ply with 25 Pa. Code §141.11(b)(5) and it requested a variance for a period considerably in excess of the maximum time permitted by 25 Pa. Code §141.4(a). In fact, given the constraints contained in these regulations, the Variance Order represented virtually the most favorable action the Department could have taken with respect to the Amended Petition.

26. The Department is authorized under the APCA to grant temporary variances only upon the terms and conditions prescribed in the Regulations adopted by the Environmental Quality Board. Since no plan or schedule for compliance with the sulfur limitations of 25 Pa. Code §123.22 was submitted with Appellant's Amended Petition for Variance, and since a variance was sought for a period in excess of three years, the substantive requirements of Chapter 141 were not met, and Appellant was not entitled to the variance it requested. See *County Commissioners of Delaware County v. Commonwealth of Pa., Department of Environmental Resources,* No. 74-261-D (Pa. Env. Hrg. Bd., July 18, 1975). Thus, in the instant appeal, Appellant is seeking relief which cannot be granted as a matter of law.

WHEREFORE, the Department respectfully moves that this Honorable Board enter an order dismissing the instant appeal in its entirety.

Respectfully submitted,

WARD T. KELSEY
Assistant Attorney General

Dated: August 25, 1976

APPENDIX M

Pertinent Statutory and Constitutional Provisions

Pertinent provisions of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 *et seq.*, provide as follows:

42 U.S.C. §1857c—2(a):

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

42 U.S.C. §1857c—5(a)(3)(A):

> "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

42 U.S.C. §1857c—8(a)(1):

> "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the

Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section."

42 U.S.C. §1857h—5(b)(1):

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1(b)(1) of this title), any determination under section 1857f—1(b)(5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title, or his action under section 1857c—10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day."

A pertinent provision of the Pennsylvania Air Pollution Control Act, 35 P.S. §4001 *et seq.*, provides as follows:

35 P.S. §4013.5(a):

"The department shall have the power to grant temporary variances from the effect of any provision of this act, or of any rule or regulation adopted hereunder, which limits the emission of any air contaminant, and the Environmental Quality Board, subject to the provisions of this section, shall adopt rules and regulations setting forth the terms and conditions subject to which such variances shall be granted. Such rules and regulations shall not authorize the grant of a variance which will prevent or interfere with the attainment or maintenance of any ambient air quality standard imposed by Federal law within the time prescribed by such law for the attainment of such standard. (footnote omitted)"

A pertinent Notice appearing in the Federal Register, Vol. 41, No. 135 of July 13, 1976, at page 28828 provides as follows:

"REVIEW OF PARTICULATE MATTER AND SULFUR DIOXIDE AIR QUALITY IN THE SOUTHWEST PENNSYLVANIA INTRASTATE AIR QUALITY CONTROL REGION

Review of air quality data submitted by the Pennsylvania Department of Environmental Resources and the Allegheny County Department of Health indicates that violations of the primary and secondary sulfur dioxide standards exists at a number of locations in the Southwest Pennsylvania Air Quality Control Region. Further, the Administrator has completed a detailed study of the air quality situation in Allegheny County to determine if the sulfur dioxide standards would be attained once full compliance with existing control strategy requirements has been achieved. This study included an update of the emission inventory for sulfur dioxide sources in the County and also included a detailed mathematical diffusion modeling exercise. Results of this indicate that the NAAQS for sulfur dioxide will not be achieved even with full compliance with existing emission limiting regulations.

Further, the Regional Administrator has undertaken a second study of the Beaver and Monongahela Air Basins, where major sources of sulfur dioxide exist. This study includes an update of the existing emission inventories for the two basins and a detailed mathematical diffusion modeling exercise that will be used to predict expected air quality when full compliance with existing regulations has been achieved. Air quality projections will also be made for the years 1985 and 2000. *Review of*

available air quality data indicates that no violations of the national primary standards of SO_2 were recorded in the two basins during 1975. Results of the study will, therefore, be used by the Pennsylvania Department of Environmental Resources to determine whether standards will be maintained in the basins. Results of this study are expected by the Fall of 1976.

A further review of air quality submitted by the Pennsylvania DER and the Allegheny County Health Department indicates that violations of the National Ambient Air Quality Standards for Particulate Matter continue to exist over a substantial part of the Southwest Pennsylvania Air Quality Control Region. The Regional Administrator has undertaken a major study to characterize the causes of these violations and determine appropriate strategies for the attainment and maintenance of the National Standards. This study includes filter analysis and pollutant advection studies as well as the development of a mathematical diffusion model that will describe the air quality situation in the Region. The results of this phase of the study will be used to test alternative attainment and maintenance control strategies. It is the belief of the Regional Administrator that the results of this major study will also be of direct benefit to a number of other regions throughout the Commonwealth and Country where similar extensive violations of the NAAQS for particulate matter have continued to occur even after full compliance with existing control regulations has been achieved. The results of this study are expected by the Fall of 1977." (emphasis added)

Pertinent provisions of the Pennsylvania implementation plan, as approved by the Respondent on May 31, 1972, provide as follows:

25 PENNSYLVANIA CODE §141.2. GRANTING OF TEMPORARY VARIANCES.

"(a) The Department may grant temporary variances from any standard or requirement set forth in this Article upon the petition of the owners or operators of the air contamination sources for which such variances are sought.

(b) The Department will grant any petition for a temporary variance, in whole or in part, upon a review of the petition and accompanying material, and upon any additional investigations which the Department may conduct, provided the Department finds all of the following:

(1) Such action will not prevent or interfere with the attainment or maintenance of any ambient air quality standard contained in this Article within the time prescribed for the attainment of such ambient air quality standard by the Clean Air Act.

(2) The quantity and level of emissions from the source at the expiration of the temporary variance are likely to comply with the applicable standards of this Article.

(3) Such action is reasonable considering the toxicity and other effects of such emissions on the public health, safety and welfare, the meteorological factors affecting the dispersion of the emissions, the land use characteristics of

the areas affected by the emissions, efforts taken by the petitioner to comply with those orders and regulations of the Department which were in effect prior to the effective date of this Chapter and which are related to those contaminants which are the subject of the petition, the status of compliance of the petitioner, and any other relevant factors."

25 PENNSYLVANIA CODE §141.5. STAY OF PROSECUTION.

"(a) A petition which complies with the requirements of §141.11 of this Title (relating to filing), and which is received by the Department within six months of the effective date of this Chapter, shall operate prospectively as an *automatic stay of prosecution* for violations of those provisions of this Article with respect to which the variance is sought, until one year after the effective date of this Chapter or until the Department takes action on such petition, whichever occurs first, except that the filing of a petition for a variance, or the grant thereof, shall not relieve the petitioner from full compliance with any orders and permits previously issued or any stipulations and agreements previously entered into by the Department, nor shall such filing in any way preclude the Department from pursuing any and all remedies available to it, at law or in equity, to enforce such orders, permits, stipulations, or agreements.

(b) The filing of a petition for a renewal or extension of any existing variance shall in no case operate as a stay of prosecution, and if the Department fails to act on any such petition before

the expiration of the original variance period, such petition shall be deemed denied in its entirety. (emphasis added)"

The Pennsylvania Bulletin, Vol. 3, No. 18, April 28, 1973, p. 808 provides:

"BUREAU OF AIR QUALITY AND NOISE CONTROL

Policy Position in Relation to Unprocessed Variances.

The Department of Environmental Resources, Bureau of Air Quality and Noise Control formally announces its policy position in relation to unprocessed variances that the Department received by September 18, 1972.

Section 5(a) of Chapter 141, Article III, Subpart C, Part I, Title 25, of the Rules and Regulations of the Department of Environmental Resources provided for a stay of prosecution on all variance requests submitted within six months of the effective date of the regulation. The stay would extend until March 19, 1973 or until Departmentmental action had been taken whichever occurs first. A change in federal regulations governing public hearing requirements on compliance schedules will significantly delay the review process until citizens have an opportunity to comment on these variance proposals. In conformance with Part 51.4 of Title 40, Code of Federal Regulations as amended December 2, 1972 the Department is proceeding to hold public hearings on these unprocessed variances as expeditiously as possible. *Up until such time as final action on the variance proposal is taken the Department will stay any prosecution* except under the following circumstances:

(1) The Department is not precluded from pursuing any and all remedies available to it, at law or in equity to enforce any existing orders, permits, stipulations or agreements.

(2) After March 19, 1973, the Department may prosecute any applicant whose emissions are greater in quantity and different in nature from what was stated in the applicant's petition for variance under §141.11(b)(3). (emphasis added)"

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tenth Amendment to the Constitution of the United States provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Supreme Court, U. S.
FILED
FEB 3 1977
MICHAEL RODAK, JR., CLERK

No. 76-567

In the Supreme Court of the United States

OCTOBER TERM, 1976

WEST PENN POWER COMPANY, PETITIONER

v.

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 110a-114a) is reported at 538 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1976 (Pet. App. 115a), and a timely petition for rehearing was denied on September 15, 1976 (Pet. App. 117a). The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Clean Air Act violates the Due Process Clause of the Fifth Amendment by permitting federal enforcement of a state implementation plan that was not

subject to challenge on grounds of economic and technological infeasibility at the plan approval stage under Section 307 of the Act.

2. Whether the Clean Air Act requires that federal enforcement of a legally adopted state implementation plan be suspended while petitioner challenges the conditions of a variance granted by the State under state administrative review procedures.

STATEMENT

On September 13, 1973, pursuant to Section 113(a) (1) of the Clean Air Act, 84 Stat. 1686, as amended, 42 U.S.C. 1857c-8(a)(1), the Administrator of the Environmental Protection Agency sent petitioner a notice that Boiler No. 33 at petitioner's Mitchell Power Station was in violation of the regulations of the Pennsylvania air quality implementation plan limiting emissions of sulfur dioxide and particulates. Petitioner filed suit in the United States District Court for the Western District of Pennsylvania seeking injunctive and declaratory relief against this notice of violation. Petitioner argued that the Pennsylvania implementation plan should have permitted the use of tall stacks as a method of meeting the sulfur dioxide restrictions in the plan. It also contended that federal enforcement of the Pennsylvania implementation plan should be barred because the Pennsylvania Department of Environmental Resources had granted petitioner a temporary variance.[1]

---

[1]On September 19, 1973, the Pennsylvania Department of Environmental Resources granted petitioner a temporary variance, extending the compliance deadline for emission of sulfur compounds from Boiler No. 33 to June 30, 1976, while requiring the installation of flue gas desulfurization equipment (a scrubber) or conversion to low-sulfur fuel. This variance has not been approved by the Environmental Protection Agency, because the variance extended beyond July 31, 1975, the final date for attainment of the primary ambient air quality standard for sulfur oxides (Pet. App. 5a). See 40 C.F.R. 51.15(b)(1); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60.

The district court dismissed the action for lack of jurisdiction. The court held that, insofar as petitioner was attacking the Pennsylvania plan, it had waived its right to review in the federal courts by not filing a timely petition to review the Environmental Protection Agency's approval of the plan. The court also held that the variance granted by the State was ineffective to bar federal enforcement of the implementation plan because Section 110(a) (3) of the Act, 84 Stat. 1680, as amended, 42 U.S.C. 1857c-5(a)(3), provides that variances must be submitted by the Governor of the State to, and approved by, the Environmental Protection Agency (Pet. App. 46a-62a).

A divided court of appeals, relying on different grounds, affirmed (Pet. App. 66a-107a). The court concluded that petitioner was not attacking the implementation plan itself, and that review was not affirmatively precluded. On the other hand, the court held that no jurisdictional basis existed for petitioner's suit against issuance of a notice of violation by the Administrator. Petitioner could raise its argument, the court stated, as a defense to any judicial proceedings that the Administrator might commence to obtain compliance with the implementation plan. On June 21, 1976, this Court denied West Penn Power Company's petition for a writ of certiorari (No. 76-567).

On March 20, 1975, prior to the court of appeals' decision, petitioner filed a petition for review of the Pennsylvania implementation plan insofar as it related to control of the emissions of sulfur dioxide at its Mitchell Power Station (Pet. App. 32a-45a). On May 19, 1975, the court of appeals entered a stay of federal enforcement pending its resolution of the issues raised in the petition for review.

On July 30, 1976, the court of appeals dismissed the petition for review on the ground that the action was indistinguishable from *Union Electric Co.* v. *Environmental*

Protection Agency, No. 74-1542, decided June 25, 1976 (Pet. App. 110a-115a). Under the terms of a stipulated order extending the original stay of federal enforcement, the order staying federal enforcement of the Pennsylvania implementation plan expired thirty days after the court of appeals' decision, or on August 30, 1976. On August 12, 1976, petitioner filed with the court of appeals a petition for rehearing *en banc* and request for an extension of a stay of enforcement. On September 15, 1976, the court of appeals denied petitioner's petition for rehearing *en banc* and request for an extension of a stay of enforcement (Pet. App. 117a).

On September 23, 1976, petitioner filed in the court of appeals a motion for stay of mandate and stay of enforcement pending review by this Court. On September 29, 1976, the court of appeals granted the motion for a stay of mandate but denied the request for a stay of enforcement.

On October 12, 1976, petitioner filed with this Court an application for a stay of enforcement pending disposition of petition for writ of certiorari. Mr. Justice Brennan denied the application on October 20, 1976.

ARGUMENT

1. Petitioner contends (Pet. 15-21) that the threat of federal enforcement of the terms of a state implementation plan submitted pursuant to the Clean Air Act, 42 U.S.C. 1857 *et seq.*, violates the Due Process Clause of the Fifth Amendment to the extent that the target source is denied an opportunity to raise claims of economic and technological infeasibility at the plan approval stage under Section 307 of the Act, 84 Stat. 1707, as amended, 42 U.S.C. 1857h-5.

In *Union Electric Co.* v. *Environmental Protection Agency*, No. 74-1542, decided June 25, 1976, this Court held that, under the 1970 Amendments to the Clean Air Act, the EPA Administrator lacked authority to consider claims of

economic and technological infeasibility in reviewing state submitted implementation plans and that such claims were therefore not a proper subject for consideration on judicial review of the Administrator's decision. The Court agreed with the Administrator "that Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a state implementation plan" (slip op. 8-9). Noting that the language of the Amendments and the legislative history showed Congress' awareness that some sources of pollutants might have to shut down (*id.* at 10-11), the Court concluded that Congress nevertheless intended to require that primary air quality standards be met.

The Court recognized, however, that claims of economic and technological infeasibility might be raised at other meaningful times. Indeed, the Court stated that "the Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards" (*id.* at 18). For example, it would not frustrate the congressional purpose to allow presentation of infeasibility claims when necessary air quality could be achieved by apportioning the control burden in a different manner; in such a case, a source not solely responsible for air pollution in its vicinity could pursue its remedies under State law. Moreover, the Court pointed out in *Union Electric* that sources of pollutants could present their views before the State agency charged with developing the implementation plan, could seek a variance from the State agency for submission to the Administrator as a revision of the implementation plan, and, in some cases, could take their claims to the state courts (*id.* at 18-19).

Claims of economic or technological infeasibility may also be relevant to fashioning the terms of a compliance order

under Section 113(a)(4) of the Clean Air Act or to the scope of relief afforded in a civil suit under Sections 113(b) or 304, 84 Stat. 1706, as amended, 42 U.S.C. 1857h-2. While we do not believe that petitioner would be entitled to raise its infeasibility claim as a defense on the merits in an enforcement proceeding or civil action,[2] we believe that petitioner could present such arguments on the question of remedies for the violation. Thus, petitioner has had, and may again have, opportunities to present its infeasibility claim.

Against this background petitioner's contention that the Due Process Clause requires leave to raise infeasibility claims in a Section 307 proceeding for judicial review is unpersuasive. More than five years ago, petitioner had the opportunity to object at the State level to the provisions of the implementation plan requiring it to meet certain standards for control of sulfur oxide emissions. After approval of the plan by the Administrator, petitioner sought a variance from the appropriate state agency but declined to comply with the conditions of the variance it received. While petitioner complains that a hearing on its appeal of the variance was delayed to its detriment, it does not appear that petitioner attempted to expedite the proceedings by mandamus or other action in state court. Nor has petitioner demonstrated that the other opportunities to raise an infeasibility claim would be inadequate to protect its rights.

To the extent, therefore, that the Clean Air Act permits consideration of infeasibility claims, a Section 307 proceeding is not an appropriate time. The purpose of a proceeding under Section 307 is to review the decision of the Administrator in approving or disapproving a State

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[2]Compare *Friends of the Earth* v. *Potomac Electric Power Co.*, 419 F. Supp. 528 (D. D.C.) with *West Penn Power Co.* v. *Train* (*West Penn I*) (Pet. App. 66a-107a).

implementation plan. Since the Administrator is not authorized to reject a plan because of infeasibility, and since no adverse consequences are visited on polluters by approval of the plan itself, consideration of such claims would not only be pointless but would create additional delays and impediments for a task that Congress clearly wished to be undertaken with dispatch.

2. Petitioner contends that the Court should grant review in order to decide whether a state-granted variance,[3] without federal approval of the variance, is sufficient to suspend federal enforcement of the implementation plan until petitioner exhausts its opportunities under state administrative procedures to challenge the variance at the state level.[4] The Court already has resolved that question adversely to petitioner's position in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92:

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency. Should either entity determine that granting the variance would prevent attainment or maintenance

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[3]The conditional variance issued by the Commonwealth (with which petitioner has not complied) and the compliance order issued to West Penn Power by EPA are consistent in that each required the company to install a scrubber on its Mitchell Power Station in accordance with substantially similar timetables. Indeed, the Commonwealth's variance is actually a compliance order requiring installation of a scrubber in accordance with a strict timetable. EPA has withdrawn its compliance order because the compliance dates for installation of the necessary pollution control equipment have long since passed.

[4]The court of appeals previously rejected petitioner's argument on this issue in *West Penn I* (Pet. App. 66a), and this Court denied West Penn Power Company's petition for a writ of certiorari in that case. The issue was not directly addressed by the court of appeals in its opinion of July 30, 1976, of which petitioner now seeks review.

> of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for *during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.* [Emphasis added.]

No further review of this issue is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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